Supreme Court, U.S.
FILED

09-435 OCT 13 2009

OFFICE OF THE CLERK

No. 09-

IN THE
Supreme Court of the United States

NEW WEST, L.P. and NEW BLUFF, L.P.,

Petitioners,

v.

CITY OF JOLIET, ILLINOIS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When Congress has expressly directed that the Nation's dwindling supply of affordable housing be preserved and expressly delegated to the Department of Housing and Urban Development ("HUD") the power to decide which housing shall be preserved, may a local municipality thereafter simply usurp HUD's authority by exercising its eminent domain powers to destroy that housing?

2. After *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) and *Cuomo v. Clearing House Association, L.L.C.*, 129 S. Ct. 2710 (2009), does conflict preemption exist or is preemption now entirely dependent upon express preemption language in a statute or regulation?

3. Does HUD's first mortgage on an affordable housing development, its right to possession of and control of the property and its status as the beneficiary of regulatory and use agreements between the owner and HUD requiring that the property remain affordable housing, create a protectable federal property interest?

4. May a local municipality seize federal property interests over the objection of the federal government?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the appellate proceeding in the United States Court of Appeals for the Seventh Circuit whose judgment is sought to be reviewed:

A. The Petitioners

New West and New Bluff are Illinois real estate limited partnerships. New West and New Bluff hold title to Evergreen Terrace I and II, respectively, which comprise Evergreen Terrace, the federally subsidized affordable housing development located in Joliet, Illinois that is at the heart of this dispute. New West and New Bluff are defendants in the underlying eminent domain action and were appellants in the Seventh Circuit.

B. The Respondents

1. Plaintiff-Appellee

Respondent City of Joliet is an Illinois municipality. Joliet is the plaintiff in the underlying eminent domain action and was the appellee before the Seventh Circuit.

2. Defendant-Appellant

Respondent United States Department of Housing and Urban Development is a defendant in the underlying eminent domain action and was an appellant before the Seventh Circuit.

3. Intervenor Defendants-Appellants

Respondents Teresa Davis, Helen Dirkans, Oscar Harris, Elvis Foster, Richard Strejc and Brenda Strejc are residents of Evergreen Terrace. They are intervenor defendants in the underlying eminent domain action and were appellants before the Seventh Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioners New West and New Bluff are limited partnerships under Illinois law. Neither has a parent corporation. No publicly held company owns stock or shares in the partnerships.

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Petitioners New West and New Bluff respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's decision on Petitioners' interlocutory appeal is reported at *City of Joliet v. New West, L.P.*, 562 F.3d 830 (7th Cir. 2009) and reprinted in Appendix A. The District Court decisions granting Joliet's Motion for Judgment on the Pleadings and denying Petitioners' and HUD's Motions for Summary Judgment are reprinted in Appendices B and C.

JURISDICTION

The District Court and the Seventh Circuit granted Petitioners leave to prosecute an interlocutory appeal from the District Court decisions. On April 9, 2009, the Seventh Circuit entered its judgment affirming the District Court decisions. Petitions for Rehearing and Rehearing *En Banc* were denied on July 14, 2009. App. D. This Court has jurisdiction to review the judgment of the Seventh Circuit on *certiorari* pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Pertinent constitutional and statutory provisions include the Property Clause of the U.S. Constitution, U.S. CONST., art. IV, §3, cl. 2, the

Supremacy Clause of the U.S. Constitution, U.S. CONST., art. VI, cl. 2, the National Housing Act, 12 U.S.C. §§1715*l*, 1716, the Housing and Community Development Amendments of 1978, 12 U.S.C. §1701z-11, and the Multifamily Assisted Housing Reform and Affordability Act, 42 U.S.C. §1437f note. These provisions are set forth in their entirety in Appendices E through K.

INTRODUCTION

The Seventh Circuit essentially has concluded that, absent express preemptive language in statute or regulation, both express Congressional delegation of decisionmaking to HUD and the Supremacy Clause of the United States Constitution may be comfortably ignored. These conclusions, Petitioners believe, are directly at odds with the Constitution and controlling Supreme Court precedent. They ignore the *explicit* Congressional delegation to HUD to investigate, to deliberate and to decide which project-based Section 8 developments – such as Evergreen Terrace, the property at the heart of this dispute – shall be preserved and which shall not; and they ignore the jurisprudence of this Court that broadly recognizes that where state and local laws interfere with federal programs – or, as here, destroy them – conflict preemption must apply. The opinion by the Seventh Circuit inappropriately grafts onto the Constitution a requirement for preemptive language that never was there, either in language or interpretation.

The Seventh Circuit also has effected a serious reworking of the Property Clause by virtue of

its crabbed construction of "property" that appears to ignore: (a) HUD's first lien mortgage and its right to possession, (b) HUD's direct right to control how the property is used and who may use it, and (c) HUD's beneficial interest in two critical contracts between it and New West and New Bluff that control the property for the next 30 years and mandate that it remain affordable housing

These radical departures – if left in place – will have an enormous impact on affordable housing throughout the country. There is an undeniable need for such housing – a need that will only intensify in years to come. If the Seventh Circuit's decision remains in place, Joliet's strategy will become a template for every community – and likely there are many – that seeks to eliminate low income affordable housing from its midst.[1] If, in fact, we are on the verge of such a sea change in the law – namely, that federal remedial programs with proper delegated authority are to be left at the mercy of local municipalities – it should come after this Court

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[1] Such dire predictions are not mere speculation. Despite the Seventh Circuit's watershed ruling on remand from this Court in *Metropolitan Development Housing Corp. v. Village of Arlington Heights*, 558 F. 2d 1283 (7th Cir. 1977), and despite the established jurisprudence of the Fair Housing Act, Joliet maintained at oral argument before the Seventh Circuit, as it had in its pleadings, that no federal law, be it Section 3617 of the Fair Housing Act, the National Housing Act, the Supremacy Clause or the Property Clause, constrained its exercise of its sovereign powers. This is the type of stance the Seventh Circuit has empowered, if not embraced.

has decided that that approach best serves the Nation and the law.[2]

This case is not *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), where federal labeling obligations and state tort liability could reasonably co-exist. Nor is it *Cuomo v. Clearing House Association, L.L.C.*, 129 S. Ct. 2710 (2009), where federal banking supervision and the state power to investigate violations of state fair lending laws were woven together. Those decisions both reflect a practical resolution to competing – but not diametrically opposed – interests.

This dispute, however, allows no possibility for accommodation or co-existence. The federal and local laws and interests are irreconcilable: HUD, following a thorough and complete review process mandated by Congress, determined that Evergreen Terrace should be preserved as affordable housing for at least the next 30 years; Joliet seeks to condemn and demolish Evergreen Terrace.

This case is thus an ideal medium through which to clarify the standards that govern conflict preemption and the deference to be extended to delegated federal power under the Supremacy Clause and the Property Clause.

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[2] This is not a political question. Congress already has spoken: it wants affordable housing preserved and it wants HUD to decide how to accomplish that. This appeal is about whether those decisions are protected by the Constitution.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background[3]

There are two federal statutes that dominate the discussion of the housing programs Congress established to ensure the preservation of federally-assisted project-based Section 8 housing such as Evergreen Terrace here. The first is the National Housing Act ("NHA"), which establishes and sets the parameters of the program and the public-private partnership that is at the core of the effort to provide such housing. The second, more recent enactment is the Multifamily Assisted Housing Reform and Affordability Act ("MAHRA"), that provides for and controls refinancing and restructuring of the Nation's aging supply of project-based Section 8 housing. In both statutory schemes, Congress expressly delegated to HUD significant and controlling decision-making authority.

1. The NHA

In 1954, Congress created a federal mortgage insurance program under Section 221 of the NHA, "designed to supplement systems of mortgage insurance under other provisions of the [NHA] in order to assist in relocating families to be displaced as the result of governmental action" – *i.e.*, urban renewal projects. Housing Act of 1954, ch. 649, §123, 68 Stat. 590, 599. The program was primarily for

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[3] The statutes most pertinent to this appeal are contained in Appendices G through K. Unless otherwise noted, citations are to the current version of the U.S. Code.

single-family dwellings. In 1961, it was significantly "broadened to authorize a new program of long-term, low-interest-rate, 100-percent loans for rental and cooperative housing projects containing five or more dwelling units." S. REP. NO. 87-281, at 8 (1961), *reprinted in* 1961 U.S.C.C.A.N. 1923, 1929. The current statement of purpose of Section 221 is "to assist private industry in providing housing for low and moderate income families and displaced families." Disaster Relief Act of 1966, Pub. L. No. 89-769, §4(a), 80 Stat. 1316, 1317 (codified at 12 U.S.C. §1715*l*(a)). It is a broad-based program designed to provide housing for low income families by and through joint public and private initiatives.

Congress made HUD the pivotal player in the effort to provide this housing. First, HUD must approve both the mortgagee and the mortgagor of any particular development. *See* 12 U.S.C. §1715*l*(d)(1), (3), (4). Generally, the note evidencing the loan and the deed of trust are approved by HUD, and HUD endorses the note as part of its mortgage insurance. HUD, in effect, selects and approves the key players. But HUD's role extends even deeper. HUD may require the mortgagor "to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation." HUD may require contracts to give effect to the restrictions it has imposed. 12 U.S.C. §1715*l*(d)(4)(iv). *See also* 12 U.S.C. §1715*l*(d)(3). Pursuant to such a contract – referred to as a "Regulatory Agreement" – the mortgagor/owner must agree to "certain 'affordability restrictions,' including restrictions on allowable rental rates, and restrictions on the rate of return the owner could

receive from the housing project." *See also* 12 U.S.C. §1715*l*(l) (rental charges). In addition, a Regulatory Agreement often incorporates by reference a Housing Assistance Payments ("HAP") contract – a written contract between the owner and HUD for the purpose of providing rent subsidies to the owner on behalf of eligible families for project-based subsidies under Section 8 of the United States Housing Act of 1937 ("USHA"), 42 U.S.C. §1437f(a)-(g). *See also* 12 U.S.C. §1715*l*(f). A Regulatory Agreement continues in effect "[a]s long as [HUD] is the insurer or holder of the mortgage." 24 C.F.R. §200.105(a). *See also* 12 U.S.C. §1713(b)(2).

The NHA requires the HUD-insured mortgage to contain terms and provisions concerning amortization of the principal, insurance, repairs, alterations, payment of taxes, default reserves, delinquency charges, foreclosure proceedings, anticipation of maturity, additional and secondary liens, and "other matters as [HUD] may in [its] discretion prescribe." *Id.*, §1715*l*(d)(5) and (6). Moreover, the property "shall comply with such standards and conditions as [HUD] may prescribe to establish the acceptability of such property for mortgage insurance and may include such commercial and community facilities as [HUD] deems adequate to serve the occupants." *Id.*, §1715*l*(f). Congress further has authorized HUD "to adopt such procedures and requirements as [it] determines are desirable to assure that the dwelling accommodations ... are available to displaced families." *Id.* HUD also has been granted substantial discretion to dispose of properties in which it has an interest. *See* 12 U.S.C. §1713(*l*). *See*

also Housing and Community Development Amendments of 1978, 12 U.S.C. §1701z-11(e).

Finally, Congress has "authorized and directed [HUD] to make such rules and regulations as may be necessary to carry out the [NHA]." *Id.*, §1715b. It is a broad grant of power that gives the agency the mandate it needs to run a complex nationwide program involving billions of dollars. HUD's regulations governing multifamily housing mortgage insurance are set forth in 24 C.F.R. parts 207 and 221.

2. MAHRA

In 1997, Congress enacted the Multifamily Assisted Housing Reform and Affordability Act ("MAHRA"), Pub. L. No. 105-65, Title V, 111 Stat. 1384 (42 U.S.C. §1437f note). MAHRA permitted HUD to refinance properties directly – often as the first mortgagee – and established a process by which the federal government would respond to the growing default rate on insured mortgages and make reconstruction and preservation funds available. MAHRA established a program known as the Mark-to-Market ("M2M") program pursuant to which existing developments may seek refinancing to make improvements as part of MAHRA's preservation agenda. MAHRA and M2M delegate to HUD the power to make the evaluation decisions with regard to preserving existing subsidized housing.

In enacting MAHRA, Congress made numerous findings. First and foremost, that "there exists throughout the Nation a need for decent, safe,

and affordable housing." MAHRA, §511(a)(1). It further found that, as of October 1997, the federal government's insured multifamily housing portfolio consisted of 14,000 rental properties – providing affordable housing to approximately 2 million low-income families – with a combined unpaid mortgage balance of $38 billion, *id.*, §511(a)(2)(A) and (3), and that the Section 8 HAP contracts on the properties were due to expire, *id.*, §511(a)(6). Without changes in the way in which federal rental assistance was provided under those contracts, owners and mortgagors of many of those multifamily housing properties likely would default on their HUD-insured mortgage payments, resulting in substantial claims to the Federal Housing Administration ("FHA") insurance funds. *Id.*, §511(a)(8). MAHRA authorized HUD to restructure and refinance such mortgages in order to preserve the Nation's stock of affordable housing.

Congress also was concerned about the distressed physical condition of many of these properties. *Id.*, §511(a)(9), (10). It found that the Nation's stock of federally insured and assisted multifamily housing would be served best by reforms that reduced the cost of federal rental assistance and reduced the cost of debt-service, freeing substantial additional sums for renovation. The ability to improve a property was to be a key factor in deciding for or against preservation. *Id.*, §511(a)(11)(A).

MAHRA therefore was intended to serve a number of explicit purposes. At the top of Congress' list: "to *preserve low-income rental housing affordability and availability* while reducing the

long-term costs of [federal] project-based assistance." *Id.*, §511(b)(1) (emphasis added). MAHRA also expressly committed the government "to protect the interest of project owners and managers, because they are partners of the Federal Government in meeting the affordable housing needs of the Nation through the section 8 rental housing assistance program." *Id.*, §511(b)(7).

3. Express Delegations to HUD

When HUD sold Evergreen Terrace to New West and New Bluff in the early 1980s, it acted pursuant to delegations in 12 U.S.C. §1701z-11, which then provided that:

> It is the policy of the United States that the Secretary of Housing and Urban Development shall manage or dispose of multifamily housing projects which are owned by the Secretary in a manner consistent with the National Housing Act [12 U.S.C. 1701 *et. seq*] and this section.

12 U.S.C. §1701z-11. *See also* 12 U.S.C. §1715*l*(f)-(k).

Under the NHA, HUD restricts the mortgagor's rents, sales, charges, capital structure, rate of return and methods of operations. HUD is authorized to enter into regulatory agreements effectuating those restrictions. *See* 12 U.S.C. §1715*l*(d)(3) and (4). *See also* 24 C.F.R. §200.105(a) ("As long as the [Secretary] is the insurer or holder

of the mortgage, the [Secretary] shall regulate the mortgagor by means of a regulatory agreement providing terms, conditions and standards established by the [Secretary].").

In MAHRA, Congress charged HUD with the responsibility to investigate and approve applicants who wish to avail themselves of the M2M program. *Id.*, §514. MAHRA also requires with respect to each financing that HUD and the owners execute enforceable Use Agreements providing that for 30 years the use of the property shall be restricted to affordable housing. *Id.*, §514(e)(6). The use restriction is established in HUD regulations, as well. 24 C.F.R. §401.408. MAHRA also gives HUD "additional enforcement tools to use against those who violate agreements and program requirements in order to ensure that the public interest is safeguarded and that federal multifamily housing programs serve their intended purposes." *Id.*, §514(b)(9).

The delegations to HUD also are manifest in the extensive HUD-generated property standards that pertain to multifamily affordable housing. *See* 24 C.F.R. §200.925 ("All housing constructed under HUD mortgage insurance and low-rent public housing programs shall meet or exceed HUD Minimum Property Standards..."). *See also* 24 C.F.R. §§200.925a *et seq.* ("Multifamily ... properties shall comply with the minimum standards contained in the handbook identified in §200.929(b)(2).") These standards are enforced by an inspection regime that authorizes HUD to take whatever steps are necessary to insure properties are well managed and

well kept. This system of regulation ensures that HUD properties will conform to appropriate health and safety standards. *See* 24 C.F.R. §200.855 *et seq.*

B. The Facts Of This Case

1. Evergreen Terrace: History and Demographics

Evergreen Terrace covers approximately 7½ acres and can house up to 1,000 residents. R. 18-2 at 3, ¶10.[4] Built originally as low-income housing in the 1960s, in the early 1980s it was redeveloped in two phases, Evergreen Terrace I and Evergreen Terrace II. *Id.* Evergreen Terrace I has approximately 500 residents. In excess of 90% of the heads of households are female and under 25 years of age. More than 96% of the heads of households are African-American; and two-thirds of the heads of households have an adjusted income of less than $5,000 per year. Evergreen Terrace II has approximately 200 residents. 74% of the heads of households are female; many are under 25 years of age; over 80% are African-American. Roughly 75% have a household income of less than $10,000 per year. Thus, collectively, the heads of households are overwhelmingly female, African-American and poor.

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[4] Citations to "R. __" and "JA __" are, respectively, to the record on appeal and the joint appendix submitted to the court of appeals.

2. The Original Mortgages and Regulatory Agreements

HUD, which had acquired both Evergreen Terrace properties through foreclosure on previous Section 221 loans, sold them to New West and New Bluff in 1980 and 1982, respectively. JA 265, 277. New West and New Bluff took out long-term mortgages on the properties, the proceeds of which were used to rehabilitate Evergreen Terrace. JA 265, 277, 284, 290. The mortgages were held by private lenders and were insured by HUD under the NHA, 12 U.S.C. §1715*l*. Each mortgage specified that the mortgagor "will not permit or suffer the use of any of the property for any purpose other than the use for which the same was intended at the time this Mortgage was executed." JA 283, 289.

In accordance with Section 221(d)(4) of the NHA, 12 U.S.C. §1715*l*(d)(4), New West and New Bluff also were governed by recorded Regulatory Agreements with HUD, JA 293, 303, which were explicitly incorporated into the Evergreen Terrace mortgages. Section 9 of the Regulatory Agreements required the owners to enter into HAP contracts with either HUD or a public housing agency for the purpose of obtaining federal rent subsidies under the USHA. JA 295, 305. Section 8 of the Regulatory Agreements provided that "[o]wners shall not without the prior written approval of [HUD] ... [c]onvey, transfer, or encumber any of the mortgaged property, or permit the conveyance, transfer, or encumbrance of such property." JA 294, 304. Section 11 further prohibited the owners from filing for bankruptcy or "permit[ting] ... the taking [of]

possession of the mortgaged property or any part thereof under judicial process ... and fail[ing] to have such adverse actions set aside within forty-five (45) days." JA 295, 305.

3. The M2M Restructured Mortgages and Agreements

In November 2001, New West and New Bluff informed HUD of their desire to restructure the mortgages for Evergreen Terrace under MAHRA and the M2M program. HUD accordingly developed debt restructuring plans for the properties. HUD selected the Illinois Housing Development Authority ("IHDA"), a state-chartered finance authority familiar with the local housing market, to serve as its agent for the mortgage restructurings and to analyze the property's rent level, debt and expenses, and repair needs. IHDA, on HUD's behalf, also was charged with evaluating the condition of the property and recommending whether it should be preserved given community need. IHDA submitted a report to HUD finding "a critical need to preserve the Evergreen Terrace I and II properties." JA 100.

When Joliet learned the refinancing and restructuring was under way, it became actively involved in the approval process and sought to convince HUD to deny any refinancing and to block continuation of the property as affordable housing. After Joliet challenged IHDA's findings, HUD hired a second company, Heskin Signet Partners, to perform a second analysis of the physical condition of the properties, the cost-effectiveness of any necessary repairs and the need for low-income

housing. Heskin Signet, too, concluded that "there is a compelling need to preserve the housing stock represented by Evergreen Terrace I and II due to the absolute lack of alternative housing for the approximately 600 current residents [about half of whom are children] of the 356 units at these properties." JA 101. Heskin Signet confirmed IHDA's determination that Evergreen Terrace "should be preserved in part due to the nearly impossible task these families would have in finding available, decent, safe, and affordable housing." *Id.*

On the basis of the two analyses and after numerous meetings with the participants in the evaluation process (including Joliet, the owners, and Evergreen Terrace residents), HUD approved a final restructuring plan in September, 2006. HUD paid off the original mortgages that it had insured and became the new mortgagee. In November 2006, the new mortgage and the 30-year Use Agreement required by MAHRA §514(e)(6) were executed and recorded for each Evergreen Terrace property. JA 102, 114, 128, 142, 161. The Use Agreements provide that, during the 30-year term, the property "shall be used solely as rental housing with no reduction in the number of residential units unless approved in writing by HUD" and that a specified percentage of the units must be occupied by low-income residents entitled to Section 8 rental assistance. JA 144, 163.

HUD and the owners also executed new Regulatory Agreements, which preserved the agency's ability to control and monitor the improvement, maintenance, access to, and operation

of Evergreen Terrace. These agreements were incorporated into the new mortgages. They contain essentially the same provisions as the initial Regulatory Agreements: the "[o]wner shall not without the written approval of [HUD] ... [t]ransfer, assign, pledge, dispose of, encumber or allow easements on any of the mortgaged property." JA 180, 208, 193-94, 220-221. Further, any such transferee must "assume all obligations under this Agreement and under the Notes and Mortgages." JA 194, 221. Finally, substantial escrow funds for immediate repairs to, and long-term maintenance of Evergreen Terrace were established as part of the restructuring. JA 102.

C. Legal Proceedings

1. The Civil Rights Action Against Joliet

In March 2005, New West and New Bluff filed a civil rights lawsuit against Joliet alleging, among other things, that Joliet's racially-motivated opposition to Evergreen Terrace's MAHRA restructuring and interference with the residents' use and enjoyment of the property violated the Fair Housing Act. *New West v. City of Joliet, et al.*, No. 05 C 1743 (N.D. Ill.).

2. Joliet's Resolution and Ordinance

In August 2005, in response to the filing of the civil rights action and its inability to convince HUD to halt the refinance of the property, Joliet declared Evergreen Terrace "a public nuisance and a blighted

area." At the time, Joliet was receiving monthly payments from HUD under its Annual Contributions Contract on Evergreen Terrace II based on its own required certifications that the property was being maintained in a decent, safe, and sanitary condition,. *See* 24 C.F.R. §883.310(b)(6) (in order to receive Section 8 rental assistance payments, projects must comply with "[a]pplicable State and local laws, codes ordinances, and regulations"). Joliet also had in its possession reports from the Joliet Fire Department that there were no violations at the site.

In October 2005, Joliet enacted Ordinance No. 15298 authorizing an eminent domain proceeding to acquire fee simple title to Evergreen Terrace.

3. Joliet's Eminent Domain Action

On October 7, 2005, Joliet filed this condemnation action in Illinois state court. Joliet named several defendants, including the Government National Mortgage Association ("GNMA"), an agency of the United States government administered by HUD, but failed to name HUD itself. The federal government removed pursuant to 28 U.S.C. §§1442, 1444, and 1446 because the action affected a property in which the United States had an interest or lien, *see* 28 U.S.C. §2410, and was against a federal agency.

Ultimately, the District Court dismissed GNMA as a defendant, but ruled that HUD was a necessary party given its significant property interest in the site. The Court rejected Joliet's efforts to remand the case. Joliet sought mandamus

relief from the denial of its remand motion. The Seventh Circuit denied the mandamus petition.

In the District Court, New West and New Bluff and HUD raised defenses to Joliet's proposed exercise of its eminent domain power, including that the condemnation was barred by the Supremacy Clause, Property Clause and Contract Clause of the United States Constitution. On April 3, 2007, the District Court granted Joliet's Motion for Judgment on the Pleadings with respect to the Supremacy Clause. App. C. Thereafter, HUD and New West and New Bluff moved for summary judgment based on preemption. On March 27, 2008, the District Court denied Defendants' motions for summary judgment rejecting as a matter of law the federal constitutional defenses. App. B. The District Court subsequently certified its ruling for interlocutory review pursuant to 28 U.S.C. §1292(b). The Seventh Circuit accepted review.

On April 9, 2009, the Seventh Circuit affirmed the District Court's rulings. *City of Joliet v. New West, L.P.*, 562 F.3d 830 (7th Cir. 2009) (Easterbrook, C.J.); App. A. The panel found there was no "clear statement" or "federal command" in the federal housing laws that would preempt Joliet's ordinance authorizing the condemnation of Evergreen Terrace. *Joliet*, 562 F.3d at 836, 837. In its view, there was no preemption because neither the NHA nor MAHRA "has any clause preempting state law". Relying on *Wyeth v. Levine*, 129 S. Ct. at 1199-1203, the panel stated that "a preemptive regulation with the force of law" is necessary in order to establish "preemption inferred from a clash

of goals and objectives." *Joliet*, 562 F.3d at 835. According to the panel, "there is no *affirmative* declaration of preemption in any statute or rule" and therefore "no concrete conflict between condemnation and any part of [MAHRA]". *Id.*, at 836. The panel added:

> It might be sensible to enact a system under which HUD could certify a lack of affordable housing in a given locale and thus block any steps to diminish the existing stock. But no federal statute gives HUD this authority, let alone one that can be exercised without notice to the cities whose powers will be diminished.

Id., at 838.

The panel never addressed the explicit Congressional delegation of preservation decisions to HUD under the NHA or MAHRA.

The panel also held that HUD's interest in the property as mortgagee, as regulator, and as beneficiary of Regulatory and Use Agreements did not rise to a protectable property interest under the Property Clause of the Constitution. *Id.*, at 839.

Requests for rehearing and rehearing *en banc* were filed by HUD, by New West and New Bluff, and by the residents. The Seventh Circuit denied them on July 14, 2009. App. D.

REASONS FOR GRANTING THE PETITION

As set forth below, the decision of the Court of Appeals substantially alters the terrain of preemption law – specifically the law of conflict preemption. It also appears to abandon the deference to delegated authority articulated in *U.S. v. Shimer*. And finally, it offers a view of the Property Clause that will render protection of any federal property interest other than fee simple interests extremely difficult.

The Seventh Circuit's decision is a political statement as much as a set of legal conclusions that is grounded in a commitment to limit federal power over local government. The decision raises important questions of federalism's balance – questions that play a central role in an on-going conversation in this Court.

A. THIS COURT SHOULD GRANT REVIEW TO CORRECT THE SEVENTH CIRCUIT'S REFUSAL TO ACKNOWLEDGE EXPRESS CONGRESSIONAL DELEGATIONS TO HUD

Despite extensive briefing and argument on the law of delegation and conflict preemption, the Seventh Circuit never acknowledged the fact that Congress *expressly* delegated to HUD the power to decide whether and how Evergreen Terrace should be preserved as affordable housing for the next 30 years. There is not a word on this controlling issue in the opinion.

The Congressional delegations to HUD, however, are unambiguous and explicit. They begin with the over-arching principle that:

> It is the policy of the United States that the Secretary of Housing and Urban Development shall manage or dispose of multifamily housing projects which are owned by the Secretary in a manner consistent with the National Housing Act [12 U.S.C. 1701 *et seq.*] and this section.

12 U.S.C. §1701z-11.

Further, Congress expressly authorized and mandated HUD to: (a) protect the financial interests of the federal government in such programs, (b) minimize displacement of residents, (c) preserve affordable housing units, and (d) minimize demolition. 12 U.S.C. §1701z-11(a)(2), (3). When an owner sought refinancing, Congress also made it HUD's duty to initiate a detailed investigation, retain appropriate experts, solicit opinions from affected parties (including here, Joliet) and, then, decide the issue. This is part of a nationwide statutory and regulatory process over which HUD presides.

Supreme Court precedent mandates deference to such delegated authority when the agency in question – here HUD – is "acting within the scope of its congressionally delegated authority." *New York v. FERC*, 535 U.S. 1, 18 (2002). *See also New York v. FCC*, 486 U.S. 57, 64 (1988) (an "agency may

determine that its authority is exclusive and preempt [] any state efforts to regulate in the forbidden area ... if the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, *we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.*") (emphasis added); *U.S. v. Shimer*, 367 U.S. 374 (1961).

The record in this case demonstrates a series of considered decisions by HUD pursuant to its delegated authority culminating in its determination that Evergreen Terrace should be preserved as federal affordable housing for at least the next 30 years. This is a decision that "Congress would have sanctioned" since Congress expressly directed that HUD proceed as it did here. *See, e.g., Shimer*, 367 U.S. at 377-378.

This decision-making process is entitled to substantial deference, yet the Seventh Circuit simply ignored it. The Seventh Circuit's dismissive comment that HUD and New West and New Bluff and the residents were claiming preemption on the basis of "purposes" or "finding" clauses in the statutes ignores the fact that HUD had made a specific finding that Evergreen Terrace should be preserved because of the shortage of affordable housing in Joliet. It ignores, too, the citations to numerous statutory provisions and regulations that detail HUD's express powers with respect to the approval, and supervision over both lenders and project owners. *See* 12 U.S.C. §1715*l*(f)-(k). *See also*

12 U.S.C. §§1715*l*(b), (d)(3) and (4); 24 C.F.R. §200.105(a).

Similarly, the panel's statement that "[i]t might be sensible to enact a system under which HUD could certify a lack of affordable housing in a given locale and thus block any steps to diminish the existing stock. But no federal statute gives HUD this authority, let alone one that can be exercised without notice to the cities whose powers will be diminished," *Joliet*, 562 F.3d at 838, ignores the fact that *this is precisely what MAHRA does*.

The Seventh Circuit's failure to engage the delegation issue allows a local government to usurp HUD's Congressionally-delegated role and extinguishes, in one swift blow, the Congressionally-mandated and statutorily required Use and Regulatory Agreements, HAP contracts and mortgages – all in violation of the Supremacy Clause.

It is, of course, possible that we have come to a juncture where lower courts may freely ignore – not even discuss – the principles of *U.S. v. Shimer* or *New York v. FERC* or *New York v. FCC* and the enumerated powers of Congress in the Constitution in considering agency action. But if this is our new jurisprudential reality, it should not be permitted to stand without careful review by the Court.

B. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE BOUNDARIES OF CONFLICT PREEMPTION

This Court recently issued two preemption decisions of considerable importance: *Wyeth* and *Cuomo*. Both ultimately take a pragmatic approach to the Supremacy Clause – permitting where possible co-existence between state authority and federal programs or law. In *Wyeth*, the Court permitted state court tort claims to survive, notwithstanding compliance with federal labeling requirements. In *Cuomo*, the State of New York was permitted to pursue a subpoena directed at compliance with state fair lending laws despite statutory deference to the OCC as a bank's regulatory authority.

Both cases also recognized, however, the continued vitality of "conflict preemption" – preemption where a federal program is defeated or seriously compromised by state or local law. In both cases, whether and in what form the doctrine exists was the subject of considerable and extended comment. The Seventh Circuit panel here, however, appears to be of the view that the doctrine has been improvidently embraced by this Court and that, absent clear preemptive language in statutes or regulations, should be put to rest. The panel went out of its way to note the absence of preemption language in the statute and a comparable absence of regulatory language limiting local power. Conflict preemption, in the Seventh Circuit's view at least, requires an incantation either in regulations or statutes that state or local law is subordinate.

Neither the Constitution nor this Court has ever required such formalism in the context of conflict preemption. That is the realm of express preemption. To now require, as the Seventh Circuit has, such language for conflict preemption is to extinguish the doctrine without saying so. Where local initiatives and federal programs are irreconcilable – as is clearly the case here – local initiatives must give way if the Supremacy Clause has any meaning.

Unlike *Wyeth* and *Cuomo*, here impossibility must be presumed. Joliet seeks the destruction of federally assisted, federally mandated and federally controlled affordable housing and the ouster of HUD from the neighborhood.

Wyeth and *Cuomo* consider but ultimately leave open the question of conflict preemption in a non-accommodationist world. It is difficult to imagine a case more suited to a clear and focused discussion of conflict preemption than this one. Only this Court can provide guidance on the nature of conflict preemption and whether it continues to exist in recognizable constitutional form.

C. THIS COURT SHOULD GRANT REVIEW BECAUSE OF THE EXCEPTIONAL IMPORTANCE OF THIS CASE TO THE CONCEPT OF FEDERAL PROPERTY AND THE PARAMETERS OF THE PROPERTY CLAUSE

Under the Property Clause of the Constitution, federal property "cannot be seized by

authority of another sovereign" over the objection of the federal government. *Armstrong v. United States*, 364 U.S. 40, 43 (1960); *Alabama v. Texas*, 347 U.S. 272, 273 (1954) ("The power to dispose of any kind of property belonging to the United States is vested in Congress without limitation.")

This Court has construed the term "property" to include "all other personal and real property rightfully belonging to the United States." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 331 (1936). Mortgages – notwithstanding the suggestion to the contrary in the Seventh Circuit's opinion – are property interests. *Armstrong v. U.S.*, 363 U.S. at 48; *City of New Brunswick v. United States*, 276 U.S. 547, 555 (1928); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601 (1935). *See also U.S. v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992).

So, too, are contract rights to control or dispose of real estate. HUD's powers to control or direct the disposition of Evergreen Terrace are set forth at length in the Use and Regulatory Agreements authorized by 12 U.S.C. §1701z-11, MAHRA §514(e)(6) and 24 C.F.R. §§100.105(a) and 401.408. These are substantial; they are enforceable; they run with the land as recorded instruments as MAHRA requires.[5]

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[5] Under the agreements: (a) HUD and the owner agree to the use of the property, including who shall occupy the property, what affordability requirements control and how the property shall be used; (b) the owner promises to maintain the premises in a particular condition and agrees to a range of remedies for default; (c) before an owner may convey, transfer, (cont'd below)

The right to control access and the ability to exclude other uses and owners was expressly bargained for by the government in the disposition of Evergreen Terrace. "The right to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). *See also Lingle v. Chevron*, 544 U.S. 528, 539 (2005) ("perhaps the most fundamental of all property interests"); *Hodel v. Irving*, 481 US 704, 716 (1987) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) ("one of the most essential sticks in the bundle of rights that are commonly characterized as property")).

The Seventh Circuit panel took an exceptionally narrow view: that HUD's property interests must be fee simple interests before the Property Clause may be invoked. There is no law that recognizes this limited view of what constitutes property and none was cited by the Seventh Circuit. Again, the panel diminished federal interests, this time by applying restrictive rules that would never obtain in a private setting. The Seventh Circuit's own precedent makes that clear.

(cont'd from above) encumber or sell the property, HUD has the right to review, approve, or prevent such transaction; (d) HUD approval is required for the owner to remodel, add to or reconstruct the property; (e) HUD may direct and control the terms of any management contract entered into by the owners; and (f) absent HUD approval, the owner shall not permit the encumbrance of or taking possession of the property under any judicial process. JA 144-45, 163-61, 293-95, 303-05.

It is important that this Court clarify the reach of the Property Clause and the parameters of what "property" means in this dispute. If all federal property other than fee simple interests is subject to seizure by state or local governments, then the Seventh Circuit has effected a profound reworking of the concept of property. And if this new concept applies only to the federal government but no one else, it is untenable as a matter of law. For this Court to permit such a reworking by default is a mistake.

D. PROTECTING NATIONAL MORTGAGE MARKETS AND HUD INSURANCE WARRANTS REVIEW BY THIS COURT

The NHA seeks to use the creative energies and power of private enterprise to meet the important goal of protecting and preserving affordable housing. As set forth in the NHA:

> This section is designed to assist private industry in providing housing for low and moderate income families and displaced families...

12 U.S.C. §1715*l*(a).

The Seventh Circuit's decision also does serious damage to this important federal program because it unravels the public-private partnerships that characterize the NHA and MAHRA.

Low income rental housing developments are essentially uneconomic under conventional valuation and mortgage underwriting standards, *i.e.*, the construction and operating costs of such developments cannot be supported by the rental income stream from the low-income residents. Because conventional mortgage financing is often unavailable for such projects, the federal government has implemented various types of federal support including HUD mortgage insurance under the NHA. Mortgage insurance facilitates the flow of mortgage capital into the affordable housing industry by insuring lenders against mortgage risks that would otherwise be unacceptable under conventional underwriting standards. HUD mortgage insurance enables a lender to make a loan for affordable housing with the assurance that, in the event of default, the lender will be able to collect mortgage insurance benefits from HUD, thereby protecting the lender from loss on a loan that it would not have funded under conventional loan underwriting standards.

HUD-insured mortgages for affordable housing are also part of a significant secondary market that has the goal of increasing liquidity in mortgage investments, enhancing the availability of mortgage credit, and improving the distribution of investment capital. Congress has facilitated the development of this market:

> The Congress declares that the purposes of this subchapter are to establish secondary market facilities...[and] to provide that the

> operations thereof shall be financed by private capital to the maximum extent feasible...

12 U.S.C. §1716.

The Seventh Circuit's embrace of Joliet's eminent domain proceeding is a serious threat to the flow of mortgage capital into the affordable housing industry.

First, it introduces significant uncertainties into the market, as it cedes control over this federal program to local interests. This is a risk that will need to be fully disclosed in the secondary market. Giving local entities the power to disrupt the income stream associated with affordable housing makes valuing these assets very difficult and discourages active private participation in the program. Over time, this uncertainty will do serious damage.

Second, it erodes the viability of HUD insurance. The lender's mortgage insurance contract with HUD requires the lender to assure HUD that title to the property is free and clear of unpermitted encumbrances as a condition of collecting mortgage insurance benefits on a defaulted loan. However, when a local governmental authority files a condemnation action, it typically also files a notice of *lis pendens* against the property, as Joliet did in the case of Evergreen Terrace. This notice of *lis pendens* constitutes an encumbrance on title that is not permitted under the HUD mortgage insurance contract. The lender is not able to cure this title defect in the same way as it could cure other types of

unpermitted encumbrances, such as a mechanic's lien, by simply paying it off and receiving a release. Rather, the notice of *lis pendens* will continue until final resolution of the condemnation proceeding. If the condemning authority prevails in the condemnation action, the lender would never be able to satisfy HUD's clear title requirements, and the effect would be the complete loss of all of the lender's protections under the HUD insurance. It would be as if the HUD insurance contract had never existed. As such, lenders would then need to make their underwriting decisions for affordable housing project loans on the assumption that the HUD insurance would not be available if a local government files a condemnation action against the affordable housing. This would create a significantly greater risk for lenders and could significantly disrupt the flow of mortgage capital, in both the primary and secondary markets, to the affordable housing industry.

To allow Joliet to seize control of and destroy a property like Evergreen Terrace and its income stream is to dismantle the capital incentives that keep the NHA's private-public partnership in place. It is another measure of the unfortunate effect of the Seventh Circuit's position.

CONCLUSION

For the reasons stated above, New West and New Bluff respectfully urge this Court to grant this Petition and set the case for briefing and argument.

Respectfully submitted,

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APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FILED APRIL 9, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 08-3032 & 08-3033

CITY OF JOLIET, ILLINOIS,

Plaintiff-Appellee,

v.

NEW WEST, L.P., and NEW BLUFF, L.P.,

Defendants-Appellants,

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and EVERGREEN TERRACE TENANTS,

Intervening Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 05 C 6746—Charles R. Norgle, Sr., Judge

Before EASTERBROOK, Chief Judge, and WILLIAMS and SYKES, Circuit Judges.

EASTERBROOK, Chief Judge.

For several years the City of Joliet, Illinois, has been trying to acquire the Evergreen Terrace apartment complex, which the City believes is so run-down that it constitutes a public nuisance. After the City commenced eminent domain proceedings in state court, New West, a partnership that owns the complex, removed the proceeding to federal court and filed a suit under 42 U.S.C. § 1983 seeking an injunction and damages. The district court put the condemnation on ice and dismissed the § 1983 action-erroneously, we held in *New West, L.P. v. Joliet*, 491 F.3d 717 (7th Cir.2007). We directed the district court to take up the condemnation proceeding first, as its disposition could resolve some or all of the issues in the § 1983 suit.

One of New West's arguments in the § 1983 suit was that, because it has accepted a federal subsidy under § 8 of the Housing Act of 1937, 42 U.S.C. § 1437f, federal law preempts the City's proceeding. Our opinion had this to say:

> New West contends that § 8 and the Fair Housing Act [42 U.S.C. §§ 3601-19] prevent condemnation of Evergreen Terrace, but it does not rely on any particular provision of that statute. Section 8 is a subsidy program, a carrot rather than a stick. HUD's regulations implementing the § 8 program contemplate the possibility of the parcel's condemnation; they do not purport to forbid condemnations. See 24 C.F.R. §§ 245.405, 248.101. For its part, the

> Fair Housing Act forbids discrimination in housing programs without providing that any given housing development has a right to continued existence. Just as with § 8, federal regulations implementing the FHA cover the demolition of housing projects. 24 C.F.R. Part 970, and exempt condemned buildings from these rules, see 24 C.F.R. § 970.3. If Joliet thinks that a given parcel of land should be put to a public use, such as a park, and is willing to foot the bill, it is hard to see any obstacle in federal law.

491 F.3d at 721. In the district court the Department of Housing and Urban Development intervened and contended that § 221 of the National Housing Act of 1954 (as amended in 1961 and 1966), 12 U.S.C. § 1715*l*, and the Multifamily Assisted Housing Reform and Affordability Act of 1997, 42 U.S.C. § 1437f note, block condemnation. The district court rejected that contention in reliance on our opinion, but, after concluding that HUD was making new arguments that we had not addressed, certified the case for interlocutory appeal under 28 U.S.C. § 1292(b). We accepted the appeal, because we thought that HUD was relying on particular language said to preempt state and local condemnation laws. Now that the appeal has been fully briefed and argued, however, HUD and the other parties acknowledge that neither of these statutes has any clause preempting state law. At this point we could stop and affirm, relying on the law of the case. But because HUD was not a

party to the first appeal, and has invoked two statutes that New West did not mention, we think it best to give the Department a full hearing and plenary decision.

First, however, a word on subject-matter jurisdiction. Joliet contends that there is none, because when the case was removed HUD was neither a party to the suit nor even a lender to New West. The eminent domain proceeding arises under state and local law. Although New West raised preemption as a federal defense, it has long been understood that a federal defense does not support removal. See, e.g., *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987); *Gully v. First National Bank*, 299 U.S. 109 (1936); *Bennett v. Southwest Airlines Co.*, 484 F.3d 907, rehearing denied, 493 F.3d 762 (7th Cir. 2007). (The exception for "complete preemption," see *Franchise Tax Board of California v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), does not apply; no one argues that federal law occupies the fields of housing or municipal powers.)

Still, the presence of the national government as a party with a security interest in the real estate supplies jurisdiction. 28 U.S.C. §§ 1444, 2410. It would be pointless to order this suit remanded, only to have HUD re-remove it in a trice. The Supreme Court has held that, when a suit is removed prematurely, the district court may proceed if it has subject-matter jurisdiction at the time it enters judgment. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 702 (1951); *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972); *Caterpillar Inc. v.*

Lewis, 519 U.S. 61 (1996). This rule, coupled with the presence of HUD (and its desire to have the suit resolved in federal court), means that remand is unnecessary.

Three federal statutes are involved in this proceeding, and HUD contends that two of them preempt state and local law. The first statute, § 8 of the Housing Act, 42 U.S.C. § 1437f, provides federal rent subsidies for low-income tenants; as we observed in 2007, this statute does not preempt any state or local law. HUD concurs. The second is § 221 of the National Housing Act, 12 U.S.C. § 1715*l*. This statute creates a program under which the federal government insures mortgages on privately owned, multifamily properties, some tenants of which receive rent subsidies under § 8. HUD has established criteria that owners must meet before a loan is insured. HUD also is authorized to pay off the private lenders and become a direct lender. For descriptions of this program, see *Cienega Gardens v. United States*, 194 F.3d 1231 (Fed. Cir. 1998), and *Geneva Towers Tenants Organization v. Federated Mortgage Investors*, 504 F.2d 483 (9th Cir. 1974). The final statute, the Multifamily Assisted Housing Reform and Affordability Act of 1997, 42 U.S.C. § 1437f note, allows HUD to renegotiate mortgages insured or assumed under § 221 of the National Housing Act. High mortgage payments make it hard (sometimes impossible) for owners to offer below-market rents to their tenants; renegotiated mortgages with lower monthly payments cut the rents to the beneficiaries of the § 8 program. Owners who seek lower mortgage payments under the 1997

Act must promise to keep their rental properties available to low-income tenants for 30 years.

Evergreen Terrace, which has 356 apartments, has participated in the § 8 and § 221 programs since the 1960s. By the late 1970s the owner was in default on its mortgage loans. HUD paid off the lenders, became the mortgage holder, foreclosed, and took title to the complex. New West purchased part of the complex from HUD in 1980 for $1, and the rest in 1982 for another $1. New West took out large mortgage loans, which HUD insured under § 221. New West promised both the lenders and HUD that it "will not permit or suffer the use of any of the property for any purpose other than the use for which the same was intended at the time this Mortgage was executed."

In 2001 New West asked HUD to restructure the mortgages under the 1997 Act, reducing the monthly payments. Both the Illinois Housing Development Authority and Heskin Signet Partners reported to HUD that the approximately 600 residents of Evergreen Terrace lack other available options for low-income housing. Relying on these reports, HUD approved the restructuring in 2006, paid off the original lenders, and became the lender (and mortgage holder) itself. As part of the transaction, New West promised that, for the next 30 years, the property "shall be used solely as rental housing with no reduction in the number of residential units unless approved in writing by HUD". New West simultaneously entered into new 20-year agreements with HUD for § 8 subsidies to low-income tenants. These agreements undertake

not to transfer, assign, or encumber the property without HUD's approval.

When we agreed to hear this interlocutory appeal, we understood HUD to argue that the contracts that New West had signed in 2006 themselves preempted any state and local powers of condemnation, and we directed the parties to address the question how New West could give away a governmental power that it never possessed. (Neither the City of Joliet nor the State of Illinois has made any promise to HUD about the maintenance of Evergreen Terrace.) HUD's appellate brief responded to our inquiry by disclaiming this theory of preemption. The contracts do not affect state or local powers, HUD recognizes. Owners such as New West must comply with all state and local laws-indeed, 24 C.F.R. § 883.310(b)(6) specifies that recipients of federal assistance are bound by all "[a]pplicable State and local laws, codes, ordinances, and regulations."

Why isn't eminent domain among these applicable state and local laws? HUD's answer is that condemnation would interfere with the purposes of § 221 and the 1997 Act. Both statutes are designed to enlarge, or at least preserve, the stock of housing available for low-income tenants. The "findings" in § 511 of the 1997 Act make this explicit. If Joliet can condemn Evergreen Terrace, 356 apartments for low-income tenants will disappear, and these tenants do not have ready alternatives. (That's what the Illinois Housing Development Authority and Heskin Signet Partners concluded.) Removing 356 units from the housing

stock could undermine achievement of the national purpose and so is preempted, the argument concludes. This line of argument implies that local government cannot condemn *any* housing, whether or not the owner has secured federal financing-for demolition of unsubsidized units diminishes the supply, and drives up the price of remaining units, as surely as the demolition of units that already enjoy federal subsidies. Yet none of the litigants ventures an argument *that* bold.

The question at hand is whether a state or local law can be preempted by the "findings" and "purposes" clauses of a federal statute, even though the state or local law does not conflict with any rule of law established in the federal statute. Recently the Supreme Court emphasized that preemption inferred from a clash of goals and objectives should not be used expansively, unless the agency has issued a preemptive regulation with the force of law, and that an agency's view that application of local law would interfere with the national objective is no substitute for such a regulation. *Wyeth v. Levine,* No. 06-1249 (U.S. Mar. 4, 2009), slip op. 17-25. Justice Breyer filed a concurring opinion to stress the importance of a preempting regulation, and Justice Thomas, concurring in the judgment, expressed doubt about this entire category of implied preemption.

HUD does not contend that any federal regulation prevents state and local governments from using eminent domain or otherwise exercises the federal power of preemption under the Supremacy Clause. One federal regulation issued

under the statutes at issue does preempt state and local law, but HUD understandably does not rely on (or even mention) it. This regulation, 24 C.F.R. § 248.183, says that no state or local law may prevent any borrower under the federal programs from prepaying the loan, and that no state or local law may set a cap on the rate of return that owners participating in the federal programs may realize. Subsection (c) of this regulation says that other state and local laws, such as zoning and building standards, are not preempted. So federal regulations not only do not contain the sort of clause that the Justices thought important in *Wyeth* but also state that most state property regulations survive. True, this savings clause does not mention eminent domain, but the main point is that no federal regulation even tries to displace local governments' power to take ownership of property by paying just compensation.

The approach of *Wyeth* to one side, it is hard to see any conflict between federal and state goals, because (a) none of the three statutes at issue makes participation compulsory; it is not a violation of federal law for a given owner to remain outside the program, so it cannot be said that federal law demands that a particular apartment unit remain standing; and (b) the agreements by which private owners enter the program do not diminish state and local powers (as HUD concedes).

Private owners are entitled to withdraw their properties from the program at any time despite their 20-year and 30-year promises. All they have to do is pay off the federally insured loan. 24 C.F.R.

Part 248. The conditions last only as long as the loans. If private owners can withdraw (and then demolish) their properties without violating any rule of federal law, why can't state or local governments acquire the properties through eminent domain and then withdraw and demolish them? The regulations treat condemnation as one legitimate source of proceeds used to prepay and retire the loans, and thus to escape the conditions. 24 C.F.R. § 248.101. Indeed, the regulatory approval needed to prepay the loans and withdraw from the program voluntarily is not required when proceeds of condemnation are the source of funds used to pay off the loans. *Ibid.* By treating condemnation as a special case, one that removes the property from an otherwise-required approval, the agency has shown that condemnation is possible. What's the point of a special rule for applying the proceeds of condemnation if, as HUD argues, condemnation is always preempted?

Another regulation provides that HUD's approval for changing a property's use is not required when the change results from eminent domain. 24 C.F.R. § 245.405, § 970.3. And that's not all. The documents that New West signed contemplate the possibility of condemnation. Paragraphs 6 and 8 of the loans and mortgages provide that the proceeds of condemnation must be paid first to the lenders (including HUD) until the loans have been satisfied; that's a strange proviso if condemnation is always forbidden by federal law. HUD dismisses all of these clauses, and its own regulations, as irrelevant because they are not issued under the 1997 Act, but the fact remains that

there is no *affirmative* declaration of preemption in any statute or rule, no concrete conflict between condemnation and any part of the 1997 Act, and no good reason to think that the 1997 Act contravenes HUD's own regulations under § 8 and § 221.

All that can be said is that, when housing is withdrawn by prepayment (including prepayment made possible by just compensation paid for a taking), the statutory goal of increasing (or at least preserving) the stock of low-income housing is undercut. Yet HUD does not point to any decision of the Supreme Court holding a state or local law preempted by broad goals (such as that more housing is better than less, low prices better than high prices) or by a general declaration such as "there exists throughout the Nation a need for decent, safe, and affordable housing", § 511(a)(1) of the 1997 Act. Nor has HUD cited any decision of any federal court holding that § 221 or the 1997 Act-or for that matter any other subsidy system, such as farm price supports or loan guarantees for veterans or small business owners, all of which include "findings" sections comparable to § 511-preempts any state or local authority to take ownership through eminent domain.

That silence is telling. We do not deal here with a city or state as regulator of private conduct. Eminent domain is a governmental power. Many decisions of the Supreme Court hold that only a clear statement in a national statute can supersede a governmental body's own operations. See, e.g., *Cook County Solid Waste Agency v. Corps of Engineers*, 531 U.S. 159, 171 (2001); *Gregory v. Ashcroft*, 501

U.S. 452, 460-61 (1991). HUD does not contend that any language in § 221 or the 1997 Act supplies a "clear statement" of a national decision to displace eminent domain. As we have mentioned, there is no statement to that effect, clear or otherwise. There is only HUD's contention that condemnation will interfere with national goals. That stripe of argument was made in *Solid Waste Agency* and *Gregory*, where it did not prevail. Congress may well have the power to prevent state or local governments from condemning low-income housing, but it has not declared that it has exercised that power; there has been no debate, no opportunity for the states to make their positions known to Congress, no proposed regulation with preemptive effect, and no focused decision by the Legislative and Executive Branches of the national government.

Quite apart from the Supreme Court's plain-statement canon for federalism cases, there is the principle that general statements of national policy do not preempt concrete laws. "Findings" and "purpose" clauses are common in federal statutes. Like the clauses in § 511 of the 1997 Act, they are usually sweeping in scope and declare an urgent need to solve a problem. But in legislation details matter. How far will the legislature go, and what costs will it bear, to achieve its ends? "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice-and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (emphasis in original). When courts rely on purpose clauses, rather than the concrete rules that the political branches have selected to achieve the stated ends, judges become effective lawmakers, bypassing the give-and-take of the legislative process. It is therefore no surprise that the Supreme Court does not think that declarations of purpose, however sweeping, preempt state or local laws. See *Hawaii v. Office of Hawaiian Affairs*, No. 07-1372 (U.S. Mar. 31, 2009), slip op. 10-11 (37 "whereas" clauses setting out congressional findings and reasons for adopting a joint resolution do not have any effect independent of the resolution's two operative clauses).

Consider *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988). A federal statute ended most federal price controls for petroleum and natural gas. The statute's purpose clause (and the accompanying committee reports) declared that it is bad policy to interfere with the market's pricing mechanism, in the absence of monopoly or equivalent concerns. Puerto Rico continued to enforce its own price controls for these products, and the producers contended that the Commonwealth's legislation was preempted by the combination of the purpose clause, the end of federal regulation, and the legislative history showing the intent behind these provisions. A court of appeals agreed and held the law preempted-but the Supreme Court reversed.

The Court explained: "While we have frequently said that pre-emption analysis requires ascertaining congressional intent ..., we have never meant that to signify congressional intent in a vacuum, unrelated to the giving of meaning to an enacted statutory text.... Respondents have brought to our attention statements that may reflect general congressional approval of a free market in petroleum products, or general congressional belief that such a market would result from enactment of the [statute], or even general congressional desire that it result. But unenacted approvals, beliefs, and desires are not laws. Without a text that can, in light of those statements, plausibly be interpreted as *prescribing* federal pre-emption it is impossible to find that a free market was mandated by federal law." 485 U.S. at 501 (emphasis in original). In other words, it takes a federal command to preempt a state or local law; a conflict between a local law and legislative aspirations does not displace another jurisdiction's law. *Wyeth* reiterated that point. Cf. *American Hospital Ass'n v. NLRB,* 499 U.S. 606 (1991); *Lincoln v. Vigil,* 508 U.S. 182 (1993). Similarly, Congress desired (and hoped) that § 211 and the 1997 Act would increase the stock of low-income housing, but a text that preempts state or local legislation is not among the steps that Congress took toward that objective.

This is not to say that federal law leaves local powers unaffected. A state or local government is not free to use its powers in order to discriminate against persons of a particular race, for example. And federal law limits the use of condemnation powers (as well as zoning or building codes) to turn a

jurisdiction into an all-white, upper-income enclave. See *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Cf. *Wisconsin Community Services, Inc. v. Milwaukee*, 465 F.3d 737 (7th Cir.2006) (en banc). But HUD does not contend that Joliet has invoked the power of eminent domain with an intent, or an effect, forbidden by the Constitution or a federal statute; HUD maintains that the City does not *have* a power to condemn federally subsidized housing, no matter how run-down the building, no matter how large the remaining supply of housing for low-income tenants, and no matter the use to which the city will put the land. On HUD's view, a city is forbidden to acquire and raze a decrepit and dangerous building, near a brand new apartment block with unused low-income units, in order to replace the old building with a new park or city hall-and this is so even if the federal appropriation can be redirected to another property to maintain the aggregate supply of low-income housing. (HUD does not contend that condemnation of Evergreen Terrace would leave it unable to spend its full appropriation.) Such a sweeping displacement of governmental authority cannot be imputed to § 221 or the 1997 Act. It might be sensible to enact a system under which HUD could certify a lack of affordable housing in a given locale and thus block any steps to diminish the existing stock. But no federal statute gives HUD this authority, let alone one that can be exercised without notice to the cities whose powers will be diminished.

Although HUD concedes that no court has attributed any preemptive effect to § 221 or the 1997 Act, it urges us to draw guidance from *Public Utility District No. 1 of Pend Oreille County v. United States*, 417 F.2d 200 (9th Cir. 1969), and *Morgan City v. South Louisiana Electric Cooperative Ass'n*, 31 F.3d 319 (5th Cir.1994), amended and rehearing en banc denied (over dissent), 49 F.3d 1074 (5th Cir. 1995). These decisions held that federal law preempts state or local efforts to condemn rural electric utilities that enjoyed federal financing under the Rural Electrification Act, 7 U.S.C. § 901 *et seq.* (At least one court of appeals has reached a contrary conclusion. See *Stilwell v. Ozarks Rural Electric Cooperative Corp.*, 79 F.3d 1038 (10th Cir. 1996).) As HUD sees things, the decisions of the fifth and ninth circuits show that local condemnation powers are incompatible with federally subsidized financing designed to achieve a federal goal (whether providing electricity to farms or housing to low-income renters).

Neither the fifth circuit nor the ninth discussed the clear-statement rule for preemption of core governmental powers, or the need (which the Court stressed in *ISLA Petroleum*) to find a conflict with a concrete statutory text. Perhaps those principles were not argued in those cases. To the extent these courts think that federal financing routinely displaces state laws, their decisions cannot be reconciled with *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375 (1983), and *Wabash Valley Power Ass'n v. Rural Electrification Administration*, 903 F.2d 445 (7th Cir. 1990). What is more, both the fifth and the

ninth circuits stressed that the federal interest was not principally related to financing. The problem with local condemnation is that electricity is distributed by a *network*. Pull out one generating station or set of transmission lines, and the rest of the network can be adversely affected. "This is not an ordinary case because what is sought to be taken here is part of a system and [if one part is condemned] a question remains as to the capacity of the remaining portions of the system to function." *Pend Oreille,* 417 F.2d at 201. One jurisdiction's condemnation thus could affect consumers in other jurisdictions; that justified a federal role. There is no comparable network externality when one city condemns an apartment block.

New West, and a tenants' association at the apartment complex, advance additional arguments, none of which HUD supports. They contend, for example, that condemnation of Evergreen Terrace violates the Contract Clause (Art. I § 10 cl. 1) because it will affect the contracts that New West has with other entities. But "the Contract Clause has never been thought to protect against the exercise of eminent domain." *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 243 n. 6 (1984). A state cannot displace a contract by fiat, but it may take interests in contracts, as in other property. New West and the tenants' association contend that, if this is so, then Joliet must be trying to take HUD's mortgage interests in Evergreen Terrace, and as no state may acquire federal property against the wishes of the national government, see *Armstrong v. United States,* 364 U.S. 40 (1960), it follows that the City's resort to eminent domain violates the Property

Clause (Art. IV § 3 cl. 2) or principles of intergovernmental immunity. Yet the national government does not own Evergreen Terrace, which Joliet proposes to acquire. HUD's interest is as a secured creditor of New West. No case of which we are aware holds that the Property Clause (or any other part of the Constitution) treats a federal loan as immunizing the borrower from state regulation (including eminent domain) on the theory that the state is "really" regulating the federal interest as a lender. One might as well say that if New West owed taxes, and the IRS had placed a lien on Evergreen Terrace, that step would prevent the City from using eminent domain (or a bankruptcy court from selling the building to satisfy New West's other creditors).

This eminent domain proceeding has been stalled since its institution more than three years ago. We trust that the district court will now bring it to a speedy conclusion.

AFFIRMED.

APPENDIX B – OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED AND FILED MARCH 27, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 05 C 6746

CITY OF JOLIET, an Illinois municipal corporation,

Plaintiff,

v.

MID-CITY NATIONAL BANK OF CHICAGO, as Successor Trustee to United of America Bank, et al.,

Defendants.

OPINION AND ORDER

CHARLES R. NORGLE, District Judge.

Before the court are two Motions for Summary Judgment, one filed by Defendant United States Department of Housing and Urban Development ("HUD") and the other filed jointly by the remaining Defendants. For the following reasons, the Motions are denied.

I. BACKGROUND

A. Facts

Plaintiff City of Joliet, Illinois ("Joliet" or the "City") is authorized under the Illinois Municipal Code to exercise the right of eminent domain to acquire real property, *inter alia,* (1) for the public welfare, (2) where acquisition of such property is necessary for the rehabilitation or redevelopment of any blighted or slum area, or (3) where acquisition of such property is necessary for the establishment of public parks, other public grounds, or recreational facilities. Joliet has determined that the apartment complex known as Evergreen Terrace I and Evergreen Terrace II (together, "Evergreen Terrace" or the "Property") is, *inter alia,* (1) extremely dilapidated, unsafe, substandard, unsanitary, crime-infested, a substantial threat to the health, welfare and safety of its residents, (2) a "blighted or slum area" under the Illinois Municipal Code, (3) interfering with the lawful use of nearby properties, and (4) diverting important public resources such as police and fire protection from nearby properties. It is undisputed that Evergreen Terrace is federally subsidized low-income housing, owned by private parties. The parties dispute, however, the extent to which various mortgage and regulatory agreements give HUD an interest in the Properties.

Joliet entered into good faith negotiation with the owners of Evergreen Terrace for the purpose of acquiring it, and authorizing the use of the city's eminent domain powers to eliminate the blighted conditions existing there. Joliet and the owners of

Evergreen Terrace, however, have been unable to reach an agreement on the price to be paid for the Property. Joliet therefore approved and adopted local Ordinance No. 15298 in order to begin eminent domain proceedings to acquire Evergreen Terrace. The City proposes to redevelop the Property to include a public park, a recreational area, and affordable housing.

B. Procedural History

On October 7, 2005, Joliet filed its Complaint for Condemnation in the Circuit Court of Will County, Illinois. Joliet purportedly filed this Complaint against all persons and entities having an interest in Evergreen Terrace. One of those Defendants was the Government National Mortgage Association ("GNMA"). GNMA is an agency of the United States government. On November 29, 2005, the United States Attorney for the Northern District of Illinois removed this case to the Northern District of Illinois. On February 27, 2006, the court granted Joliet's Motion to Voluntarily Dismiss GNMA, but denied Joliet's Motion to Remand, finding that HUD had a reversionary interest in the Property. The court granted Defendants' Rule 19(a) Motion to Join HUD as a Necessary Party on March 9, 2006.

On July 5, 2007, the Seventh Circuit entered an Opinion in a related case, *New West, L.P. v. City of Joliet*, 491 F.3d 717 (7th Cir.2007). In this related case, the owners of Evergreen Terrace sued Joliet, alleging that the Supremacy Clause prohibits the condemnation of the Property, that the City's activities related to the condemnation violate 42

U.S.C §§ 1982 and 1983, and that Joliet has violated the Fair Housing Act, 42 U.S.C. §§ 3601-19, by discouraging prospective minority tenants from living in Evergreen Terrace. *Id.* at 719. This court dismissed the case, but the Seventh Circuit reversed and remanded. In so doing, the Seventh Circuit indicated that this court must first resolve the condemnation suit before proceeding on the related case. *Id.* at 721. Writing for the Seventh Circuit, Chief Judge Easterbrook indicated that there was no federal impediment to Joliet's exercise of eminent domain in this case. He stressed that "[i]f Joliet thinks that a given parcel of land should be put to a public use, such as a park, and is willing to foot the bill, it is hard to see any obstacle in federal law." *Id.*

Following the Seventh Circuit's Opinion in the *New West* case, this court issued a Minute Order in the instant condemnation case in which it granted Defendants leave to refile their Motion for Summary Judgment. Defendants have since timely filed separate Motions for Summary Judgment, These Motions are fully briefed and before the court.[1]

II. DISCUSSION

A. Standard of Decision

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[1] On August 3, 2007, the court issued an Opinion and Order granting Joliet's Motion for Judgment on the Pleadings with Respect to the Supremacy Clause Defense. Defendants' Summary Judgment arguments regarding the Supremacy Clause are therefore moot.

Summary judgment is permissible when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The nonmoving party cannot rest on the pleadings alone, but must identify specific facts, *see Cornfield v. Consolidated High Sch. Dist. No. 230,* 991 F.2d 1316, 1320 (7th Cir.1993), that raise more than a mere scintilla of evidence to show a genuine triable issue of material fact. *See Murphy v. ITT Technical Services, Inc.,* 176 F.3d 934, 936 (7th Cir. 1999).

In deciding a motion for summary judgment, the court can only consider evidence that would be admissible at trial under the Federal Rules of Evidence. *See Bombard v. Fort Wayne Newspapers, Inc.,* 92 F.3d 560, 562 (7th Cir. 1996). The court views the record and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party, FED. R. CIV, P. 56(c); *see also Perdomo v. Browner,* 67 F.3d 140, 144 (7th Cir. 1995). "In the light most favorable" simply means that summary judgment is not appropriate if the court must make "a choice of inferences." *See United States v. Diebold, Inc.,* 369 U.S. 654, 655; *see also First Nat'l Bank of Ariz. v. Cities Service Co.,* 391 U.S. 253, 280 (1968); *Wolf v. Buss (America) Inc.,* 77 F.3d 914, 922 (7th Cir. 1996). The choice between reasonable inferences from facts is a jury function. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S., 242, 255 (1986).

When the defendant moves for summary judgment, the court must view the record and all inferences in a light most favorable to the plaintiff. *Ameritech Benefit Plan Comm. v. Communication*

Workers of Am., 220 F.3d 814, 821 (7th Cir. 2000). However, the inferences construed in the plaintiff's favor must be drawn from specific facts identified in the record that support the plaintiff's position. *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 922-23 (7th Cir. 1994). Under this standard, "[c]onclusory allegations alone cannot defeat a motion for summary judgment." *Thomas v. Christ Hospital and Medical Center*, 32S F.3d, 890, 892-93 (7th Cir. 2003) (citing *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 888-89 (1990)).

B. Defendants' Motions for Summary Judgment

In support of their Motions for Summary Judgment, Defendants collectively make the following assertions. Certain portions of the United States Constitution bar Joliet's condemnation of Evergreen Terrace: the Supremacy Clause, the Property Clause, and the Contracts Clause. The doctrine of intergovernmental immunity bars Joliet's condemnation of Evergreen Terrace. Joliet is equitably estopped from condemning Evergreen Terrace. The Complaint in this case is insufficient. The court has already determined that the Supremacy Clause does not preempt Joliet's attempt to condemn Evergreen Terrace. *See* Opinion and Order of August 3, 2007.

1. The Property Clause

The Property Clause of the United States Constitution provides, "The Congress shall have Power to dispose of and make all needful Rules and

Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST., art. IV, § 3, cl. 2. By its express terms, the Property Clause applies only to property owned by the United States. In this case, there is no question that Evergreen Terrace is privately owned, although the parties dispute the extent to which HUD has various contractual and reversionary interests in the Property.

Even if Evergreen Terrace were somehow owned by the United States, however, the Property Clause has never been interpreted as an impediment to the application of state law or regulations such as this condemnation action. "The Property Clause itself does not automatically conflict with all State regulation of federal land." *California Coastal Comm., v. Granite Rock Co.*, 480 U.S. 572, 580 (1987). "[F]ederal ownership of lands within a State does not withdraw those lands from the jurisdiction of the State." *Kleppe v. New Mexico*, 426 U.S. 529, 544 (1976) (citing *Wilson v. Cook*, 327 U.S. 474, 487-88 (1946) and *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650 (1930)). The Property Clause therefore has no bearing on this case.

2. The Contracts Clause

The Contracts Clause of the United States Constitution provides, "No State shall ... pass any ... Law impairing the Obligation of Contracts." U.S. CONST., art. I, § 10, cl. 1. Courts do not interpret the Contracts Clause literally. *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 894 (7th Cir. 1998). "Even big, totally unpredictable impairments of the

obligation of contracts can survive challenges under the contracts clause if they are responsive to economic emergencies ... and even to considerably less exigent needs." *Id.* at 896 (internal citations omitted). If the state law at issue "serve[s] a legitimate public purpose such as remedying a general social or economic problem," and "the means chosen to accomplish this purpose are reasonable and necessary," the law does not run afoul of the Contracts Clause. *Buffalo Teachers Federation v. Tobe,* 464 F.3d 362, 368 (2nd Cir. 2006) (citing *Energy Reserves Group. Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 411-13 (1983)).

At the summary judgment stage of this litigation, the court cannot say as a matter of law that Joliet's proposed condemnation of Evergreen Terrace serves no legitimate public purpose, and is not a reasonable means of remedying what Joliet perceives to be a "general social or economic problem." *See id.* The undisputed facts establish that Joliet plans to redevelop the Property to include various public benefits. Defendants' Contracts Clause assertions in support of their Motions for Summary Judgment therefore fail.

3. Intergovernmental Immunity

The concept of intergovernmental immunity has its roots on the Supremacy Clause of the United States Constitution.

> [T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner

> control, the operations of the constitutional laws . enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

McCulloch v. Maryland, 17 U.S. 316, 435 (1819). The court has already determined that the Supremacy Clause is no bar to Joliet's attempt to condemn Evergreen Terrace. *See* Opinion and Order of August 3, 2007. Moreover, intergovernmental immunity has never been extended to private parties. It is clear that the Supremacy Clause forbids States from directly taxing or regulating the United States, *United States v. New Mexico*, 455 U.S. 720, 733 (1982), or "federally established instrumentalit[ies]," *First Agricultural Bank v. State Tax Commission*, 392 U.S. 339, 350 (1968). However, where State taxation or regulation merely "has an effect on the United States," intergovernmental immunity does not apply." *New Mexico*, 455 U.S. at 734. As the court has repeatedly explained, Evergreen Terrace is privately owned property. It is clearly not a "federally established instrumentality." The court therefore cannot find, as a matter of law, that the doctrine of intergovernmental immunity prevents Joliet from proceeding with its condemnation action.

4. Equitable Estoppel

HUD asserts that Joliet is equitably estopped from finding that one of the Evergreen Terrace buildings is blighted. In making this assertion, HUD relies exclusively on language in a contract it has with Joliet which provides that Joliet is to inspect the building in question annually in order to assure that it is safe and clean. This argument is meritless. The power to condemn due to blight is not limited to specific buildings found to be in disrepair. "[T]he fact that there may be some sound buildings in the slum and blighted area is no defense to the proceedings. Property may be taken which, standing by itself, is unoffending, for the test is based on the condition of the area as a whole," *City of Chicago v. Barnes,* 195 N.E.2d 629, 631 (Ill. 1964) (citing *Berman v. Parker,* 348 U.S. 26, 34-35 (1954)). In this case, Joliet has determined that the Evergreen Terrace area as a whole is blighted. Whether the specific building in question is or is not blighted in not relevant.

5. Insufficiency of the Complaint

Finally, Defendants assert that the Complaint in this case is insufficient because Joliet has not named the tenants of Evergreen Terrace as Defendants, and because Joliet has not adequately described the interests it seeks to condemn. It is not clear to the court why these issues were not brought in a motion to dismiss. In any event, these assertions are unavailing.

On January 31, 2008, the court granted the Evergreen Tenants' unopposed Motion to Intervene.

The tenants of Evergreen Terrace are now Defendants in this case. Rule 71.1 of the Federal Rules of Civil Procedure (former Rule 71A) provides that, in a condemnation action, the Complaint must plainly state the "interests to be acquired." FED R. CIV. P. 71.1(c)(2)(D). Paragraph 27 of Joliet's Amended Complaint states that it "seeks to acquire the full fee simple title to the Subject Property." It is difficult to discern how Joliet could have more adequately described the interests it seeks in Evergreen Terrace.

III. CONCLUSION

For the foregoing reasons, Defendants' Motions for Summary Judgment are denied.

IT IS SO ORDERED.

ENTER:
s/ Charles R. Norgle
CHARLES RONALD NORGLE, Judge
United States District Court

Dated: March 27, 2008

APPENDIX C – OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED AND FILED AUGUST 3, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 05 C 6746

CITY OF JOLIET, an Illinois municipal corporation,

Plaintiff,

v.

MID-CITY NATIONAL BANK OF CHICAGO, as Successor Trustee to United of America Bank, et al.,

Defendants.

OPINION AND ORDER

CHARLES R. NORGLE, District Judge.

Before the court is Plaintiff City of Joliet's Motion for Judgment on the Pleadings with Respect to the Supremacy Clause Defense. For the following reasons, the Motion is granted.

I. BACKGROUND

A. Facts

Plaintiff City of Joliet, Illinois ("Joliet" or the "City") alleges the following facts in its Amended Complaint for Condemnation. Joliet is authorized under the Illinois Municipal Code to exercise the right of eminent domain to acquire real property, *inter alia*, (1) for the public welfare, (2) where acquisition of such property is necessary for the rehabilitation or redevelopment of any blighted or slum area, or (3) where acquisition of such property is necessary for the establishment of public parks, other public grounds, or recreational facilities. Joliet has determined that the apartment complex known as Evergreen Terrace I and Evergreen Terrace II (together, "Evergreen Terrace" or the "Property") is, *inter alia*, (1) extremely dilapidated, unsafe, substandard, unsanitary, crime-infested, a substantial threat to the health, welfare and safety of its residents, (2) a "blighted or slum area" under the Illinois Municipal Code, (3) interfering with the lawful use of nearby properties, and (4) diverting important public resources such as police and fire protection from nearby properties.

Joliet therefore entered into good faith negotiation with the owners of Evergreen Terrace for the purpose of acquiring it, and authorizing the use of the city's eminent domain powers to eliminate the blighted conditions existing there. Joliet and the owners of Evergreen Terrace, however, have been unable to reach an agreement on the price to be paid for the Property. Joliet therefore approved and

adopted local Ordinance No. 15298 in order to begin eminent domain proceedings to acquire Evergreen Terrace. The City proposes to redevelop the Property to include a public park, a recreational area, and affordable housing.

B. Procedural History

On October 7, 2005, Joliet filed its Complaint for Condemnation in the Circuit Court of Will County, Illinois. Joliet purportedly filed this Complaint against all persons and entities having an interest in Evergreen Terrace. One of those Defendants was the Government National Mortgage Association ("GNMA"). GNMA is an agency of the United States government. On November 29, 2005, the United States Attorney for the Northern District of Illinois removed this case to the Northern District of Illinois. On February 27, 2006, the court granted Joliet's Motion to Voluntarily Dismiss GNMA, but denied Joliet's Motion to Remand, finding that the United States Department of Housing and Urban Development ("HUD") had a reversionary interest in the Property. The court granted Defendants' Rule 19(a) Motion to Join HUD as a Necessary Party on March 9, 2006.

On July 5, 2007, the Seventh Circuit entered an Opinion in a related case, *New West. L.P. v. City of Joliet,* --- F.3d ---, 06-3665 (7th Circuit July 5, 2007). In this related case, the owners of Evergreen Terrace sued Joliet, alleging that the Supremacy Clause prohibits the condemnation of the Property, that the City's activities related to the condemnation violate 42 U.S.C. §§ 1982 and 1983, and that Joliet

has violated the Fair Housing Act, 42 U.S.C. §§ 3601-19, by discouraging prospective minority tenants from living in Evergreen Terrace. *Id.*, slip. op. at 2. This court dismissed the case, but the Seventh Circuit reversed and remanded. In so doing, the Seventh Circuit indicated that this court must first resolve the condemnation suit before proceeding on the related case. *Id.*, slip. op. at 3.

Writing for the Seventh Circuit, Chief Judge Easterbrook indicated that there was no federal impediment to Joliet's exercise of eminent domain in this case. "If Joliet thinks that a given parcel of land should be put to a public use, such as a park, and is willing to foot the bill, it is hard to see any obstacle in federal law." *Id.*, slip. op. at 6.

Following the Seventh Circuit's Opinion in the *New West* case, this court issued a Minute Order in the instant condemnation case in which it granted Joliet leave to refile its Motion for Summary Judgment. This Motion will become fully briefed on approximately September 10, 2007.

In the meantime, Joliet has filed the instant Motion for Judgment on the Pleadings with Respect to the Supremacy Clause Defense. Joliet has filed this Motion in response to HUD's third affirmative defense in this case, which asserts that "[t]he Supremacy Clause of the United States Constitution prohibits the City of Joliet from exercising eminent domain over or condemning the defendant Evergreen Terrace properties." In its Motion for Judgment on the Pleadings, Joliet argues that federal law does not preempt the Illinois Municipal Code, or the City's

local ordinance, regarding the eminent domain action against Evergreen Terrace. This Motion is fully briefed and before the court.

II. DISCUSSION

A. Standard of Decision

Federal Rule of Civil Procedure 12(h)(2) provides that "an objection of failure to state a legal defense to a claim may be made ... by a motion for judgment on the pleadings." Federal Rule of Civil Procedure 12(c) states that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Plaintiff's Motion for Judgment on the Pleadings with Respect to the Supremacy Clause Defense is appropriately and timely presented to the court.

1. Preemption

The Supremacy Clause of the United States Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the Supreme Law of the Land." U.S. CONST., art. VI, cl.2. This Clause does not create any federal rights; instead, it " 'secures federal rights by according them priority whenever they come in conflict with state law.' " *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107 (1989) (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)). The Supremacy Clause therefore "support[s] three ways in which federal law can preempt state and local law: express preemption, conflict (or implied)

preemption, and field (or complete) preemption." *Hoagland v. Town of Clear Lake,* 415 F.3d 693, 696 (7th Cir. 2005). The only type of preemption at issue in this case, conflict preemption, occurs where "it would be impossible for a party to comply with both local and federal requirements or where local law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* (quoting *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287 (1995)).

Courts are to presume that " 'Congress does not intend to supplant state law,' This is particularly true where a party claims that federal law bars state action in areas of traditional state regulation ...." *Frank Bros., Inc. v. Wis. DOT,* 409 F.3d 880, 885 (7th Cir. 2005) (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 654 (1995)); *City of Columbus v. Ours Garage & Wrecker Serv.,* 536 U.S. 424, 432 (2002) ("we start with the assumption that the historic police powers of the States were not to be superceded by [a] Federal Act unless that was the clear and manifest purpose of Congress.") (internal quotation marks and citation omitted). The burden therefore falls on the party asserting preemption to demonstrate that Congress clearly intended to override whatever state law is at issue. *See In re Ocwen Federal Bank FSB Mortgage Servicing Litgation,* MDL No. 1604, Lead Case No. 04 C 2714, 2006 U .S. Dist. LEXIS 21715 (N.D. Ill. March 22, 2006).

2. Eminent Domain

It is well-established law that municipalities may use eminent domain procedures to condemn and take private property for a legitimate public purpose. *Kelo v. City of New London*, 545 U.S. 469 (2005) (holding that a city's carefully considered redevelopment plan was not unconstitutional, even where property would be taken from private parties and given to other private parties); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (holding that a Hawaii statute under which property was taken from private landowners and transferred to lessees, in order to eliminate the "social and economic evils of land oligopoly" met the standards of a valid public use); *Berman v. Parker*, 348 U.S. 26 (1954) (upholding a redevelopment plan targeting a blighted area of Washington, D.C.). It is also well-established that when municipalities exercise the power of eminent domain, "the government must pay the owner just compensation, which is determined to be the property's fair market value." *Shaikh v. City of Chicago*, 341 F.3d 627, 632 (7th Cir. 2003) (citing *United States v. Miller*, 317 U.S. 369, 373-74 (1943); *United States v. 58.16 Acres of Land*, 478 F.2d 1055, 1058 (7th Cir. 1973)).

In adjudicating takings cases, the Supreme Court has long deferred to the judgment of local legislatures as to whether a particular taking serves a "public purpose." *Kelo*, 545 U.S. at 480.

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public

> welfare is broad and inclusive ... The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled ... If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Berman, 348 U.S. at 33. The *Kelo* court reaffirmed *Berman's* "deferential approach to legislative judgments in the field," and noted that the Supreme Court's "earliest cases in particular embodied a strong sense of federalism, emphasizing the great respect that we owe to state legislatures and state courts in discerning local public needs." *Kelo,* 545 U.S. at 482 (citing *Hairston v. Danville & Western R. Co.,* 208 U.S. 598, 606-07 (1908)); *see also National Ass'n of Regulatory Utility v. F.E.R.C.,* 475 F.3d 1277, 1287 (D.C. Cir. 2007) ("Courts have long recognized that eminent domain is at the very core of state sovereignty."). The court will therefore adopt a "deferential approach" to the decisions of the local legislature as it analyzes the issues specific to the instant motion, as well as issues relevant to this entire case.

B. Plaintiff's Motion for Partial Judgment on the Pleadings

Defendants, with the exception of HUD, have filed a joint brief in opposition to Plaintiff's Motion. HUD, represented by the United States Attorney's office, has filed a separate brief in opposition to this Motion. Defendants Mid-City National Bank of Chicago, et al., argue that the Supremacy Clause prohibits Joliet from condemning Evergreen Terrace because the federal government has a substantial interest in the Property, and the State laws and the local ordinance permitting the condemnation are preempted by HUD regulations, Section 8 of the United States Housing Act, and the Multifamily Assisted Housing Reform and Affordability Act ("MAHRA"). HUD asserts that Joliet's eminent domain action, carried out pursuant to state law, is preempted by HUD regulations, MAHRA, as well as the Property Clause and the Contract Clause of the United States Constitution. [1]Defendants also argue that Judge Easterbrook's statement, "[i]f Joliet thinks that a given parcel of land should be put to a public use, such as a park, and is willing to foot the bill, it is hard to see any obstacle in federal law," *New West,* slip. op. at 6, is mere dictum, and should therefore have no bearing on this court's adjudication of the instant motion.

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[1] The court notes that the instant Motion references only the Supremacy Clause and related preemption issues. Issues regarding the Property and Contract Clauses are not properly before the court at this point.

Defendants first argument, that the federal government's interest in Evergreen Terrace prohibits Joliet from exercising eminent domain over the Property, stems from HUD's mortgage and reversionary interests in Evergreen Terrace. In HUD's answer to the Amended Complaint, HUD explains that

> [i]n addition to HUD being a mortgage holder on Evergreen Terrace I and II, the incorporated regulatory agreements provide that in the event of a HUD-non-authorized transfer of the defendant properties, such as the subject condemnation action, the HUD Secretary would have the right to take possession of the properties, as well as foreclose on the mortgages.

It is undisputed, however, that at present, Evergreen Terrace is privately owned property. Its owners have a voluntary contractual relationship with HUD which gives HUD the above described interests in the Property. HUD, however, does not own Evergreen Terrace. HUD's reliance on *Shaikh,* in which the Seventh Circuit observed that the City of Chicago could not pursue condemnation proceedings against HUD-owned property, is therefore misplaced. The owners of Evergreen Terrace are private parties. In *Shaikh,* the Seventh Circuit warned that a private party " 'who acquires or occupies land does so at the risk of being evicted by the exercise of the superior right of the government or its delegate to acquire his interest upon payment of just compensation.' " 341 F.3d at

631 (quoting *United States v. 16.92 Acres of Land*, 670 F.2d 1369, 1371 (7th Cir. 1982)). Moreover, "HUD's regulations implementing the § 8 program contemplate the possibility of the parcel's condemnation; they do not purport to forbid condemnations." *New West*, slip. op. at 6. HUD's mortgage and reversionary interest in Evergreen Terrace is thus not an impediment to Joliet's plan to exercise its power of eminent domain over the Property.

Defendants' arguments that federal statutes preempt Joliet's attempt to exercise its power of eminent domain over Evergreen Terrace are also unavailing. "New West contends that § 8 and the Fair Housing Act prevent condemnation of Evergreen Terrace, but it does not rely on any particular provision of that statute. Section 8 is a subsidy program, a carrot rather than a stick." *Id.* In other words, the § 8 program was designed to encourage private property owners to provide low-income housing-there is simply no basis on which to conclude that Congress intended for this program to also preempt local governments' use of their powers of eminent domain. *See Baker v. Property Investors of Conn.*, 338 F.Supp.2d 321, 323 (D. Conn. 2004) ("Section 8 of the Housing Act 'aids low-income families in obtaining a decent place to live and ... promotes economically mixed housing' ... by providing federal subsidies to private building owners who are willing to rent to low-income families.") (internal citation omitted). In enacting MAHRA, Congress intended to, *inter alia*, "preserve low-income rental housing affordability and availability ... streamline and improve federally

insured and assisted multifamily housing project oversight ... [and] to resolve the problems affecting financially and physically troubled federally insured and assisted multifamily housing projects ...." MAHRA § 511(b); *see also Neighborhood Research Inst, v. Campus Ptnrs. for Cmty. Urban Dev.*, 212 F.R.D. 364, 366-67 (S.D. Ohio 2002). Once again, there is simply no basis on which to conclude that MAHRA was intended to preempt local municipalities' ability to exercise their powers of eminent domain.

Finally, it is arguable that Judge Easterbrook's observation that "it is hard to see any obstacle in federal law" to Joliet's condemnation of Evergreen Terrace is indeed *dictum proprium*: "[a] personal or individual [statement] that is given by the judge who delivers an opinion but that is not necessarily concurred in by the whole court and is not essential to the disposition." BLACK'S LAW DICTIONARY 485 (8th ed. 2004). However, the court cannot presume that a statement by the Chief Judge of the Seventh Circuit Court of Appeals carries no weight simply because it may be dictum. To the contrary, in our hierarchical judicial system, a federal district court must take the observations of its appellate court very seriously, regardless of whether these observations are contained in the higher court's holdings, or are indeed simply dicta. "[A] federal district court is required to give great weight to the pronouncements of its Court of Appeals, even though those pronouncements appear by way of dictum ... [W]e cannot presume that our Court of Appeals writes merely for intellectual exercise." *Pickett v. Prince*, 52 F. Supp. 2d 893, 904

(N.D. Ill. 1999) (internal quotation marks and citation omitted). The court has thoroughly considered the observations of Chief Judge Easterbrook and has independently reached the conclusion that they are correct. Moreover, it is not unusual for the Seventh Circuit to offer guidance to district courts or parties. Even where such guidance is not "essential to the disposition" of the case, a district court or party overlooks it at its peril. *See Blue Cross Blue Shield of Illinois v. Cruz,* No. 03-4170, slip op. at 8 (7th Cir. July 27, 2007). The court therefore declines Defendants' invitation to ignore Judge Easterbrook's observation regarding the lack of any federal impediment to Joliet's condemnation of Evergreen Terrace.

III. CONCLUSION

As the court has noted, it is Defendants' burden to demonstrate to the court that federal law preempts Joliet's attempt to condemn and redevelop Evergreen Terrace. Defendants have failed to meet this burden. Plaintiff City of Joliet's Motion for Judgment on the Pleadings with Respect to the Supremacy Clause Defense is therefore granted.

IT IS SO ORDERED.

ENTER:
s/ Charles R. Norgle
CHARLES RONALD NORGLE, Judge
United States District Court

Dated: August 3, 2007

APPENDIX D – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FILED JULY 14, 2009, DENYING REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 08-3032 & 08-3033

CITY OF JOLIET, ILLINOIS,

Plaintiff-Appellee,

v.

NEW WEST, L.P., and NEW BLUFF, L.P.,

Defendants-Appellants,

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and EVERGREEN TERRACE TENANTS,

Intervening Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 05 C 6746—Charles R. Norgle, Sr., Judge

Before EASTERBROOK, Chief Judge, and WILLIAMS and SYKES, Circuit Judges.

ORDER

Defendants-Appellants and Intervening Defendants-Appellants filed three separate petitions for rehearing and rehearing en banc on May 26, 2009. No judge in regular active service has requested a vote on the petitions for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petitions for rehearing are therefore DENIED.

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* Judge Flaum did not participate in the consideration of these petitions.

APPENDIX E – UNITED STATES CONSTITUTION ARTICLE IV, SECTION 3, CLAUSE 2

U.S. CONST., art. IV, § 3, cl. 2

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or Property belonging to the United States....

APPENDIX F – UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2

U.S. CONST., art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX G – 12 U.S.C. § 1701z-11.

§ 1701z-11. Management and disposition of multifamily housing projects

(a) Goals

The Secretary of Housing and Urban Development shall manage or dispose of multifamily housing projects that are owned by the Secretary or that are subject to a mortgage held by the Secretary in a manner that—

(1) is consistent with the National Housing Act [12 U.S.C.A. § 1701 et seq.] and this section;

(2) will protect the financial interests of the Federal Government; and

(3) will, in the least costly fashion among reasonable available alternatives, address the goals of—

(A) preserving certain housing so that it can remain available to and affordable by low-income persons;

(B) preserving and revitalizing residential neighborhoods;

(C) maintaining existing housing stock in a decent, safe, and sanitary condition;

(D) minimizing the involuntary displacement of tenants;

(E) maintaining housing for the purpose of providing rental housing, cooperative housing, and homeownership opportunities for low-income persons;

(F) minimizing the need to demolish multifamily housing projects;

(G) supporting fair housing strategies; and

(H) disposing of such projects in a manner consistent with local housing market conditions.

In determining the manner in which a project is to be managed or disposed of, the Secretary may balance competing goals relating to individual projects in a manner that will further the purposes of this section.

(b) Definitions

For purposes of this section:

(1) Multifamily housing project

The term "multifamily housing project" means any multifamily rental housing project which is, or prior to acquisition by the Secretary was, assisted or insured under the National Housing Act [12 U.S.C.A. § 1701 et seq.], or was subject to a loan under section 1701q of this title.

(2) Subsidized project

The term "subsidized project" means a multifamily

housing project that, immediately prior to the assignment of the mortgage on such project to, or the acquisition of such mortgage by, the Secretary, was receiving any of the following types of assistance:

(A) Below market interest rate mortgage insurance under the proviso of section 221(d)(5) of the National Housing Act [12 U.S.C.A. § 1715*l*(d)(5)].

(B) Interest reduction payments made in connection with mortgages insured under section 236 of the National Housing Act [12 U.S.C.A. 1715z-1].

(C) Direct loans made under section 1701q of this title.

(D) Assistance in the form of—

(i) rent supplement payments under section 101 of the Housing and Urban Development Act of 1965 [12 U.S.C.A. § 1701s],

(ii) additional assistance payments under section 236(f)(2) of the National Housing Act [12 U.S.C.A. § 1715z-1(f)(2)],

(iii) housing assistance payments made under section 23 of the United States Housing Act of 1937 (as in effect before January 1, 1975) [42 U.S.C.A. § 1421b], or

(iv) housing assistance payments made under

section 8 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f] (excluding payments made for tenant-based assistance under section 8 [42 U.S.C.A. § 1437f]),

if (except for purposes of section 183(c) of the Housing and Community Development Act of 1987) such assistance payments are made to more than 50 percent of the units in the project.

(3) Formerly subsidized project

The term "formerly subsidized project" means a multifamily housing project owned by the Secretary that was a subsidized project immediately prior to its acquisition by the Secretary.

(4) Unsubsidized project

The term "unsubsidized project" means a multifamily housing project owned by the Secretary that is not a subsidized project or a formerly subsidized project.

(5) Affordable

A unit shall be considered affordable if—

(A) for units occupied—

(i) by very low-income families, the rent does not exceed 30 percent of 50 percent of the area median income, as determined by the Secretary, with adjustments for smaller and larger

families; and

(ii) by low-income families other than very low-income families, the rent does not exceed 30 percent of 80 percent of the area median income, as determined by the Secretary, with adjustments for smaller and larger families; or

(B) the unit, or the family residing in the unit, is receiving assistance under section 8 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f].

(6) Low-income families and very low-income families

The terms "low-income families" and "very low-income families" shall have the meanings given the terms in section 3(b) of the United States Housing Act of 1937 [42 U.S.C.A. § 1437a(b)].

(7) Preexisting tenant

The term "preexisting tenant" means, with respect to a multifamily housing project acquired pursuant to this section by a purchaser other than the Secretary at foreclosure or after sale by the Secretary, a family that resides in a unit in the project immediately before the acquisition of the project by the purchaser.

(8) Market area

The term "market area" means a market area determined by the Secretary.

(9) Secretary

The term "Secretary" means the Secretary of Housing and Urban Development.

(c) Disposition of property

(1) Disposition to purchasers

In carrying out this section, the Secretary may dispose of a multifamily housing project owned by the Secretary on a negotiated, competitive bid, or other basis, on such terms as the Secretary deems appropriate considering the low-income character of the project and consistent with the goals in subsection (a) of this section, only to a purchaser determined by the Secretary to be capable of—

(A) satisfying the conditions of the disposition plan developed under paragraph (2) for the project;

(B) implementing a sound financial and physical management program that is designed to enable the project to meet anticipated operating and repair expenses to ensure that the project will remain in decent, safe, and sanitary condition and in compliance with any standards under applicable State or local laws, rules, ordinances, or regulations relating to the physical condition of the housing and any such standards established by the Secretary;

(C) responding to the needs of the tenants and working cooperatively with tenant organizations;

(D) providing adequate organizational, staff, and financial resources to the project; and

(E) meeting such other requirements as the Secretary may determine.

(2) Disposition plan

(A) In general

Prior to the sale of a multifamily housing project that is owned by the Secretary, the Secretary shall develop an initial disposition plan for the project that specifies the minimum terms and conditions of the Secretary for disposition of the project, the initial sales price that is acceptable to the Secretary, and the assistance that the Secretary plans to make available to a prospective purchaser in accordance with this section.

(B) Market-wide plans

In developing the initial disposition plan under this subsection for a multifamily housing project located in a market area in which at least 1 other multifamily housing project owned by the Secretary is located, the Secretary may coordinate the disposition of all such multifamily housing projects located within the same market area to the extent and in such manner as the Secretary determines appropriate to carry out the goals under subsection (a) of this section.

(C) Sales price

The initial sales price shall be reasonably related to the intended use of the project after sale, any rehabilitation requirements for the project, the rents for units in the project that can be supported by the market, the amount of rental assistance available for the project under section 8 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f], the occupancy profile of the project (including family size and income levels for tenant families), and any other factors that the Secretary considers appropriate.

(D) Community and tenant input

In carrying out this section, the Secretary shall develop procedures—

(i) to obtain appropriate and timely input into disposition plans from officials of the unit of general local government affected, the community in which the project is situated, and the tenants of the project; and

(ii) to facilitate, where feasible and appropriate, the sale of multifamily housing projects to existing tenant organizations with demonstrated capacity, to public or nonprofit entities that represent or are affiliated with existing tenant organizations, or to other public or nonprofit entities.

(E) Technical assistance

To carry out the procedures developed under subparagraph (D), the Secretary may provide

technical assistance, directly or indirectly, and may use amounts available for technical assistance under the Emergency Low Income Housing Preservation Act of 1987 [12 U.S.C.A. § 4101 et seq.], subtitle C of the Low-Income Housing Preservation and Resident Homeownership Act of 1990, subtitle B of title IV of the Cranston-Gonzalez National Affordable Housing Act [42 U.S.C.A. § 12871 et seq.], or this section, for the provision of technical assistance under this paragraph. Recipients of technical assistance funding under the provisions referred to in this subparagraph shall be permitted to provide technical assistance to the extent of such funding under any of such provisions or under this subparagraph, notwithstanding the source of the funding.

(3) Foreclosure sale

In carrying out this section, the Secretary shall—

(A) prior to foreclosing on any mortgage held by the Secretary on any multifamily housing project, notify both the unit of general local government in which the property is located and the tenants of the property of the proposed foreclosure sale; and

(B) dispose of a multifamily housing project through a foreclosure sale only to a purchaser that the Secretary determines is capable of implementing a sound financial and physical management program that is designed to enable the project to meet anticipated operating and repair expenses to ensure that the project will

remain in decent, safe, and sanitary condition and in compliance with any standards under applicable State or local laws, rules, ordinances, or regulations relating to the physical condition of the housing and any such standards established by the Secretary.

(d) Management and maintenance of properties

(1) Contracting for management services

In carrying out this section, the Secretary may—

(A) contract for management services for a multifamily housing project that is owned by the Secretary (or for which the Secretary is mortgagee in possession) with for-profit and nonprofit entities and public agencies (including public housing authorities) on a negotiated, competitive bid, or other basis at a price determined by the Secretary to be reasonable, with a manager the Secretary has determined is capable of—

(i) implementing a sound financial and physical management program that is designed to enable the project to meet anticipated operating and maintenance expenses to ensure that the project will remain in decent, safe, and sanitary condition and in compliance with any standards under applicable State or local laws, rules, ordinances, or regulations relating to the physical condition of the project and any such standards established by the Secretary;

(ii) responding to the needs of the tenants and working cooperatively with tenant organizations;

(iii) providing adequate organizational, staff, and financial resources to the project; and

(iv) meeting such other requirements as the Secretary may determine; and

(B) require the owner of a multifamily housing project that is subject to a mortgage held by the Secretary to contract for management services for the project in the manner described in subparagraph (A).

(2) Maintenance of projects owned by Secretary

In the case of multifamily housing projects that are owned by the Secretary (or for which the Secretary is mortgagee in possession), the Secretary shall—

(A) to the greatest extent possible, maintain all such occupied projects in a decent, safe, and sanitary condition and in compliance with any standards under applicable State or local laws, rules, ordinances, or regulations relating to the physical condition of the housing and any such standards established by the Secretary;

(B) to the greatest extent possible, maintain full occupancy in all such projects; and

(C) maintain all such projects for purposes of providing rental or cooperative housing.

(3) Projects subject to a mortgage held by Secretary

In the case of any multifamily housing project that is subject to a mortgage held by the Secretary, the Secretary shall require the owner of the project to carry out the requirements of paragraph (2).

(e) Required assistance

In disposing of multifamily housing property under this section, consistent with the goal of subsection (a)(3)(A) of this section, the Secretary shall take, separately or in combination with other actions under this subsection or subsection (f) of this section, one or more of the following actions:

(1) Contract with owner for project-based assistance

In the case of multifamily housing projects that are acquired by a purchaser other than the Secretary at foreclosure or after sale by the Secretary, the Secretary may enter into contracts under section 8 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f] (to the extent budget authority is available) with owners of the projects, subject to the following requirements:

(A) Subsidized or formerly subsidized projects receiving mortgage-related assistance

In the case of a subsidized or formerly subsidized project referred to in subparagraphs (A) through (C) of subsection (b)(2) of this section—

(i) the contract shall be sufficient to assist at least all units covered by an assistance contract under any of the authorities referred to in subsection (b)(2)(D) of this section before acquisition or foreclosure, unless the Secretary acts pursuant to the provisions of subparagraph (C);

(ii) the contract shall provide that, when a vacancy occurs in any unit in the project requiring project-based rental assistance pursuant to this subparagraph that is occupied by a family who is not eligible for assistance under such section 8 [42 U.S.C.A. § 1437f], the owner shall lease the available unit to a family eligible for assistance under such section 8 [42 U.S.C.A. § 1437f]; and

(iii) the Secretary shall take actions to ensure that any unit in any such project that does not otherwise receive project-based assistance under this subparagraph remains available and affordable for the remaining useful life of the project, as defined by the Secretary; to carry out this clause, the Secretary may require purchasers to establish use or rent restrictions maintaining the affordability of such units.

(B) Subsidized or formerly subsidized projects receiving rental assistance

In the case of a subsidized or formerly subsidized project referred to in subsection (b)(2)(D) of this section that is not subject to subparagraph (A)—

(i) the contract shall be sufficient to assist at least all units in the project that are covered, or were covered immediately before foreclosure on or acquisition of the project by the Secretary, by an assistance contract under any of the provisions referred to in such subsection, unless the Secretary acts pursuant to provisions of subparagraph (C); and

(ii) the contract shall provide that, when a vacancy occurs in any unit in the project requiring project-based rental assistance pursuant to this subparagraph that is occupied by a family who is not eligible for assistance under such section 8 [42 U.S.C.A. § 1437f], the owner shall lease the available unit to a family eligible for assistance under such section 8 [42 U.S.C.A. § 1437f].

(C) Exceptions

(i) Authority

In lieu of providing project-based assistance under section 8 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f] in accordance with subparagraph (A)(i) or (B)(i) for a project, the Secretary may, for certain units in unsubsidized projects located within the same market area as the project otherwise required to be assisted with such project-based assistance—

(I) require use and rent restrictions providing that such units shall be available to and

affordable by very low-income families for the remaining useful life of the project (as defined by the Secretary), or

(II) provide project-based assistance under section 8 [42 U.S.C.A. § 1437f] for such units to be occupied by only very low-income persons,

but only if the requirements under clause (ii) are met.

(ii) Requirements

The requirements under this clause are that—

(I) upon the disposition of the project otherwise required to be assisted with project-based assistance under subparagraph (A)(i) or (B)(i), the Secretary shall make available tenant-based assistance under section 8 [42 U.S.C.A. § 1437f] to low-income families residing in units otherwise required to be assisted with such project-based assistance; and

(II) the number of units subject to use restrictions or provided assistance under clause (i) shall be at least equivalent to the number of units otherwise required to be assisted with project-based assistance under section 8 [42 U.S.C.A. § 1437f] in accordance with subparagraph (A)(i) or (B)(i).

(D) Unsubsidized projects

Notwithstanding actions taken pursuant to subparagraph (C), in the case of unsubsidized projects, the contract shall be sufficient to provide—

(i) project-based rental assistance for all units that are covered, or were covered immediately before foreclosure or acquisition, by an assistance contract under—

(I) the new construction and substantial rehabilitation program under section 8(b)(2) of the United States Housing Act of 1937 (as in effect before October 1, 1983) [42 U.S.C.A § 1437f(b)(2)];

(II) the property disposition program under section 8(b) of such Act [42 U.S.C.A. § 1437f(b)];

(III) the project-based certificate program under section 8 of such Act [42 U.S.C.A. § 1437f];

(IV) the moderate rehabilitation program under section 8(e)(2) of such Act [42 U.S.C.A. § 1437f(e)(2)];

(V) section 23 of such Act (as in effect before January 1, 1975) [42 U.S.C.A. § 1421b];

(VI) the rent supplement program under section 101 of the Housing and Urban Development Act of 1965 [12 U.S.C.A. §

1701s]; or

(VII) section 8 of the United States Housing Act of 1937, following conversion from assistance under section 101 of the Housing and Urban Development Act of 1965 [12 U.S.C.A. § 1701s]; and

(ii) tenant-based assistance under section 8 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f] for families that are preexisting tenants of the project in units that, immediately before foreclosure or acquisition of the project by the Secretary, were covered by an assistance contract under the loan management set-aside program under section 8(b) of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f(b)].

(2) Annual contribution contracts for tenant-based assistance

In the case of multifamily housing projects that are acquired by a purchaser other than the Secretary at foreclosure or after sale by the Secretary, the Secretary may enter into annual contribution contracts with public housing agencies to provide tenant-based assistance under section 8 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f] on behalf of all low-income families who are otherwise eligible for assistance in accordance with subparagraph (A), (B), or (D) of paragraph (1) on the date that the project is acquired by the purchaser, subject to the following requirements:

(A) Requirement of sufficient affordable housing in area

The Secretary may not take action under this paragraph unless the Secretary determines that there is available in the area an adequate supply of habitable, affordable housing for very low-income families and other low-income families using tenant-based assistance.

(B) Limitation for subsidized and formerly subsidized projects

The Secretary may not take actions under this paragraph in connection with units in subsidized or formerly subsidized projects for more than 10 percent of the aggregate number of units in such projects disposed of by the Secretary in any fiscal year.

(3) Other assistance

(A) In general

In accordance with the authority provided under the National Housing Act [12 U.S.C.A. § 1701 et seq.], the Secretary may provide other assistance pursuant to subsection (f) of this section to the owners of multifamily housing projects that are acquired by a purchaser other than the Secretary at foreclosure, or after sale by the Secretary, on terms that ensure that—

(i) at least the units in the project otherwise required to receive project-based assistance

pursuant to subparagraphs (A), (B), or (D) of paragraph (1) are available to and affordable by low-income persons; and

(ii) for the remaining useful life of the project, as defined by the Secretary, there shall be in force such use or rent restrictions as the Secretary may prescribe.

(B) Very low-income tenants

If, as a result of actions taken pursuant to this paragraph, the rents charged to any very low-income families residing in the project who are otherwise required (pursuant to subparagraph (A), (B), or (D) of paragraph (1)) to receive project-based assistance under section 8 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f] exceed the amount payable as rent under section 3(a) of the United States Housing Act of 1937 [42 U.S.C.A. § 1437a(a)], the Secretary shall provide tenant-based assistance under section 8 of such Act [42 U.S.C.A. § 1437f] to such families.

(f) Discretionary assistance

In addition to the actions required under subsection (e) of this section for a subsidized, formerly subsidized, or unsubsidized multifamily housing project, the Secretary may, pursuant to the disposition plan and the goals in subsection (a) of this section, take one or more of the following actions:

(1) Discounted sales price

In accordance with the authority provided under the National Housing Act [12 U.S.C.A. § 1701 et seq.], the Secretary may reduce the selling price of the project. Such reduced sales price shall be reasonably related to the intended use of the property after sale, any rehabilitation requirements for the project, the rents for units in the project that can be supported by the market, the amount of rental assistance available for the project under section 8 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f], the occupancy profile of the project (including family size and income levels for tenant families), and any other factors that the Secretary considers appropriate.

(2) Use and rent restrictions

The Secretary may require certain units in a project to be subject to use or rent restrictions providing that such units will be available to and affordable by low- and very low-income persons for the remaining useful life of the property, as defined by the Secretary.

(3) Short-term loans

The Secretary may provide short-term loans to facilitate the sale of a multifamily housing project if—

(A) authority for such loans is provided in advance in an appropriation Act;

(B) such loan has a term of not more than 5

years;

(C) the Secretary determines, based upon documentation provided to the Secretary, that the borrower has obtained a commitment of permanent financing to replace the short-term loan from a lender who meets standards established by the Secretary; and

(D) the terms of such loan are consistent with prevailing practices in the marketplace or the provision of such loan results in no cost to the Government, as defined in section 661a of Title 2.

(4) Up-front grants

If the Secretary determines that action under this paragraph is more cost-effective than establishing rents pursuant to subsection (h)(2) of this section, the Secretary may utilize the budget authority provided for contracts issued under this section for project-based assistance under section 8 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f] to (in addition to providing project-based section 8 rental assistance) provide up-front grants for the necessary cost of rehabilitation and other related development costs. This paragraph shall be effective during fiscal years 2006 through 2010 only to the extent that such budget authority is made available for use under this paragraph in advance in appropriation Acts.

(5) Tenant-based assistance

The Secretary may make available tenant-based assistance under section 8 of the United States

Housing Act of 1937 [42 U.S.C.A. § 1437f] to families residing in a multifamily housing project that do not otherwise qualify for project-based assistance.

(6) Alternative uses

(A) In general

Notwithstanding any other provision of law, after providing notice to and an opportunity for comment by preexisting tenants, the Secretary may allow not more than—

(i) 10 percent of the total number of units in multifamily housing projects that are disposed of by the Secretary during any fiscal year to be made available for uses other than rental or cooperative uses, including low-income homeownership opportunities, or in any particular project, community space, office space for tenant or housing-related service providers or security programs, or small business uses, if such uses benefit the tenants of the project; and

(ii) 5 percent of the total number of units in multifamily housing projects that are disposed of by the Secretary during any fiscal year to be used in any manner, if the Secretary and the unit of general local government or area-wide governing body determine that such use will further fair housing, community development, or neighborhood revitalization goals.

(B) Displacement protection

The Secretary may take actions under subparagraph (A) only if—

(i) tenant-based rental assistance under section 8 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f] is made available to each eligible family residing in the project that is displaced as a result of such actions; and

(ii) the Secretary determines that sufficient habitable, affordable rental housing is available in the market area in which the project is located to ensure use of such assistance.

(7) Transfer for use under other programs of Secretary

(A) In general

Notwithstanding the provisions of subsection (e) of this section, the Secretary may, pursuant to an agreement under subparagraph (B), transfer a multifamily housing project—

(i) to a public housing agency for use of the project as public housing; or

(ii) to an entity eligible to own or operate housing assisted under section 1701q of this title or under section 811 of the Cranston-Gonzalez National Affordable Housing Act [42 U.S.C.A. § 8013] for use as supportive housing

under either of such sections.

(B) Requirements for agreement

An agreement providing for the transfer of a project described in subparagraph (A) shall—

(i) contain such terms, conditions, and limitations as the Secretary determines appropriate, including requirements to ensure use of the project as public housing, supportive housing under section 1701q of this title, or supportive housing under section 811 of the Cranston-Gonzalez National Affordable Housing Act [42 U.S.C.A. § 8013], as applicable; and

(ii) ensure that no tenant of the project will be displaced as a result of actions taken under this paragraph.

(8) Rebuilding

Notwithstanding any provision of section 8 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f], the Secretary may provide project-based assistance in accordance with subsection (e) of this section to support the rebuilding of a multifamily housing project rebuilt or to be rebuilt (in whole or in part and on-site, off-site, or in a combination of both) in connection with disposition under this section, if the Secretary determines that—

(A) the project is not being maintained in a

decent, safe, and sanitary condition;

(B) rebuilding the project would be less expensive than substantial rehabilitation;

(C) the unit of general local government in which the project is located approves the rebuilding and makes a financial contribution or other commitment to the project; and

(D) the rebuilding is a part of a local neighborhood revitalization plan approved by the unit of general local government.

The provisions of subsection (j)(2) of this section shall apply to any tenants of the project who are displaced.

(9) Emergency assistance funds

The Secretary may make arrangements with State agencies and units of general local government of States receiving emergency assistance under part A of title IV of the Social Security Act [42 U.S.C.A. § 601 et seq.] for the provision of assistance under such Act [42 U.S.C.A. § 301 et seq.] on behalf of eligible families who would reside in any multifamily housing projects.

(g) Protection for unassisted very low-income tenants

For each multifamily housing project disposed of under this section, the Secretary shall require that, for any very low-income family who is a preexisting tenant of the project who (upon disposition) would be

required to pay rent in an amount in excess of 30 percent of the adjusted income (as such term is defined in section 3(b) of the United States Housing Act of 1937 [42 U.S.C.A. § 1437a(b)]) of the family—

(1) for a period of 2 years beginning upon the date of the acquisition of the project by the purchaser under such disposition, the rent for the unit occupied by the family may not be increased above the rent charged immediately before acquisition;

(2) such family shall be considered displaced for purposes of any system of preferences established pursuant to section 6(c)(4)(A), 8(d)(1)(A), or 8(o)(6)(A) of the United States Housing Act of 1937 [42 U.S.C.A. §§ 1437d(c)(4)(A), 1437f(d)(1)(A), and 1437f(o)(6)(A)]; and

(3) notice shall be provided to such family, not later than the date of the acquisition of the project by the purchaser—

(A) of the requirements under paragraphs (1) and (2); and

(B) that, after the expiration of the period under paragraph (1), the rent for the unit occupied by the family may be increased.

(h) Contract requirements

Contracts for project-based rental assistance under section 8 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f] provided pursuant to this section shall be subject to the following

requirements:

(1) Contract term

The contract shall have a term of 15 years, except that the term may be less than 15 years—

(A) to the extent that the Secretary finds that, based on the rental charges and financing for the multifamily housing project to which the contract relates, the financial viability of the project can be maintained under a contract having such a term; except that the Secretary shall require that the amount of rent payable by tenants of the project for units assisted under such contract shall not exceed the amount payable for rent under section 3(a) of the United States Housing Act of 1937 [42 U.S.C.A. § 1437a(a)] for a period of at least 15 years; or

(B) if such assistance is provided—

(i) under a contract authorized under section 6 of the HUD Demonstration Act of 1993; and

(ii) pursuant to a disposition plan under this section for a project that is determined by the Secretary to be otherwise in compliance with this section.

(2) Contract rent

The Secretary shall establish the contract rents under such contracts at levels that, together with other resources available to the purchasers, provide sufficient amounts for the necessary costs

of rehabilitating and operating the multifamily housing project and do not exceed the percentage of the existing housing fair market rentals for the market area in which the project assisted under the contract is located as determined by the Secretary under section 8(c) of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f(c)].

(i) Right of first refusal for local and State government agencies

(1) Notification

Not later than 30 days after the Secretary acquires title to a multifamily housing project, the Secretary shall notify the appropriate unit of general local government (including public housing agencies) and State agency or agencies designated by the chief executive officer of the State in which the project is located of such acquisition of title and that, for a period beginning upon such notification that does not exceed 90 days, such unit of general local government and agency or agencies shall have the exclusive right under this subsection to make bona fide offers to purchase the project.

(2) Right of first refusal

During the 90-day period, the Secretary may not sell or offer to sell the multifamily housing project other than to a party notified under paragraph (1), unless the unit of general local government and the designated State agency or agencies notify the Secretary that they will not make an offer to purchase the project. The Secretary shall accept a

bona fide offer to purchase the project made during such period if it complies with the terms and conditions of the disposition plan for the project or is otherwise acceptable to the Secretary.

(3) Procedure

The Secretary shall establish any procedures necessary to carry out this subsection.

(j) Displacement of tenants and relocation assistance

(1) In general

Whenever tenants will be displaced as a result of the demolition of, repairs to, or conversion in the use of, a multifamily housing project that is owned by the Secretary (or for which the Secretary is mortgagee in possession), the Secretary shall identify tenants who will be displaced, and shall notify all such tenants of their pending displacement and of any relocation assistance that may be available. In the case of a multifamily housing project that is subject to a mortgage held by the Secretary, the Secretary shall require the owner of the project to carry out the requirements of this paragraph, if the Secretary has authorized the demolition of, repairs to, or conversion in the use of such multifamily housing project.

(2) Rights of displaced tenants

The Secretary shall ensure for any such tenant (who continues to meet applicable qualification standards) the right—

(A) to return, whenever possible, to a repaired or rebuilt unit;

(B) to occupy a unit in another multifamily housing project owned by the Secretary;

(C) to obtain housing assistance under the United States Housing Act of 1937 [42 U.S.C.A. § 1437 et seq.]; or

(D) to receive any other available similar relocation assistance as the Secretary determines to be appropriate.

(k) Mortgage and project sales

(1) In general

The Secretary may not approve the sale of any loan or mortgage held by the Secretary (including any loan or mortgage owned by the Government National Mortgage Association) on any subsidized project or formerly subsidized project, unless such sale is made as part of a transaction that will ensure that such project will continue to operate at least until the maturity date of such loan or mortgage, in a manner that will provide rental housing on terms at least as advantageous to existing and future tenants as the terms required by the program under which the loan or mortgage was made or insured prior to the assignment of the loan or mortgage on such project to the Secretary.

(2) Sale of certain projects

The Secretary may not approve the sale of any

subsidized project—

(A) that is subject to a mortgage held by the Secretary, or

(B) if the sale transaction involves the provision of any additional subsidy funds by the Secretary or a recasting of the mortgage,

unless such sale is made as part of a transaction that will ensure that the project will continue to operate, at least until the maturity date of the loan or mortgage, in a manner that will provide rental housing on terms at least as advantageous to existing and future tenants as the terms required by the program under which the loan or mortgage was made or insured prior to the proposed sale of the project.

(3) Mortgage sales to State and local governments

Notwithstanding any provision of law that requires competitive sales or bidding, the Secretary may carry out negotiated sales of mortgages held by the Secretary, without the competitive selection of purchasers or intermediaries, to units of general local government or State agencies, or groups of investors that include at least one such unit of general local government or State agency, if the negotiations are conducted with such agencies, except that—

(A) the terms of any such sale shall include the agreement of the purchasing agency or unit of local government or State agency to act as mortgagee or owner of a beneficial interest in

such mortgages, in a manner consistent with maintaining the projects that are subject to such mortgages for occupancy by the general tenant group intended to be served by the applicable mortgage insurance program, including, to the extent the Secretary determines appropriate, authorizing such unit of local government or State agency to enforce the provisions of any regulatory agreement or other program requirements applicable to the related projects; and

(B) the sales prices for such mortgages shall be, in the determination of the Secretary, the best prices that may be obtained for such mortgages from a unit of general local government or State agency, consistent with the expectation and intention that the projects financed will be retained for use under the applicable mortgage insurance program for the life of the initial mortgage insurance contract.

(4) Sale of mortgages covering unsubsidized projects

Notwithstanding any other provision of law, the Secretary may sell mortgages held on projects that are not subsidized or formerly subsidized projects on such terms and conditions as the Secretary may prescribe.

(5) Mortgage sale demonstration

The Secretary may carry out a demonstration to test the feasibility of restructuring and disposing of

troubled multifamily mortgages held by the Secretary through the establishment of partnerships with public, private, and nonprofit entities.

(6) Project sale demonstration

The Secretary may carry out a demonstration to test the feasibility of disposing of troubled multifamily housing projects that are owned by the Secretary through the establishment of partnerships with public, private, and nonprofit entities.

(l) Report to Congress

Not later than June 1 of each year, the Secretary shall submit to the Congress a report describing the status of multifamily housing projects owned by or subject to mortgages held by the Secretary, on an aggregate basis, which highlights the differences, if any, between the subsidized and the unsubsidized inventory. The report shall include—

(1) the average and median size of the projects;

(2) the geographic locations of the projects, by State and region;

(3) the years during which projects were assigned to the Department, and the average and median length of time that projects remain in the HUD-held inventory;

(4) the status of HUD-held mortgages;

(5) the physical condition of the HUD-held and HUD-owned inventory;

(6) the occupancy profile of the projects, including the income, family size, race, and ethnic origin of current tenants, and the rents paid by such tenants;

(7) the proportion of units that are vacant;

(8) the number of projects for which the Secretary is mortgagee in possession;

(9) the number of projects sold in foreclosure sales;

(10) the number of HUD-owned projects sold;

(11) a description of actions undertaken pursuant to this section, including a description of the effectiveness of such actions and any impediments to the disposition or management of multifamily housing projects;

(12) a description of the extent to which the provisions of this section and actions taken under this section have displaced tenants of multifamily housing projects;

(13) a description of any of the functions performed in connection with this section that are contracted out to public or private entities or to States; and

(14) a description of the activities carried out under subsection (i) of this section during the preceding year.

APPENDIX H – 12 U.S.C. § 1715*l*

§ 1715*l*. Housing for moderate income and displaced families

(a) Purpose

This section is designed to assist private industry in providing housing for low and moderate income families and displaced families.

(b) Authorization

The Secretary is authorized, upon application by the mortgagee, to insure under this section as hereinafter provided any mortgage (including advances during construction on mortgages covering property of the character described in paragraphs (3) and (4) of subsection (d) of this section) which is eligible for insurance as provided herein and, upon such terms and conditions as the Secretary may prescribe, to make commitments for the insurance of such mortgages prior to the date of their execution or disbursement thereon.

(c) Definitions

As used in this section, the terms "mortgage", "first "mortgage", "mortgagee", "mortgagor", "maturity date" and "State" shall have the same meaning as in section 1707 of this title.

(d) Eligibility for insurance; conditions; limits

To be eligible for insurance under this section, a mortgage shall—

(1) have been made to and be held by a mortgagee approved by the Secretary as responsible and able to service the mortgage properly;

(2) be secured by property upon which there is located a dwelling conforming to applicable standards prescribed by the Secretary under subsection (f) of this section, and meeting the requirements of all State laws, or local ordinances or regulations, relating to the public health or safety, zoning, or otherwise, which may be applicable thereto, and shall involve a principal obligation (including such initial service charges, appraisal, inspection, and other fees as the Secretary shall approve) in an amount (A) not to exceed (i) $31,000 (or $36,000, if the mortgagor's family includes five or more persons) in the case of a property upon which there is located a dwelling designed principally for a single-family residence, (ii) $35,000 in the case of a property upon which there is located a dwelling designed principally for a two-family residence, (iii) $48,600 in the case of a property upon which there is located a dwelling designed principally for a three-family residence, or (iv) $59,400 in the case of a property upon which there is located a dwelling designed principally for a four-family residence, except that the Secretary may increase the foregoing amounts to not to exceed $36,000 (or $42,000 if the mortgagor's family includes five or more persons), $45,000, $57,600, and $68,400, respectively, in any geographical area where he finds that cost levels so

require; and (B) not to exceed the appraised value of the property (as of the date the mortgage is accepted for insurance): *Provided*, That (i)(1) in the case of a displaced family, he shall have paid on account of the property at least $200 in the case of a single-family dwelling, $400 in the case of a two-family dwelling, $600 in the case of a three-family dwelling, and $800 in the case of a four-family dwelling, or (2) in the case of any other family, he shall have paid on account of the property at least 3 per centum of the Secretary's estimate of its acquisition cost (excluding the mortgage insurance premium paid at the time the mortgage is insured), in cash or its equivalent; which amount in either instance may include amounts to cover settlement costs and initial payments for taxes, hazard insurance, and other prepaid expenses; or (ii) in the case of repair and rehabilitation, the amount of the mortgage shall not exceed the sum of the estimated cost of repair and rehabilitation and the Secretary's estimate of the value of the property before repair and rehabilitation, except that in no case involving refinancing shall such mortgage exceed such estimated cost of repair and rehabilitation and the amount (as determined by the Secretary) required to refinance existing indebtedness secured by the property: *Provided further*, That the mortgagor shall to the maximum extent feasible be given the opportunity to contribute the value of his labor as equity in such dwelling; or

(3) if executed by a mortgagor which is a public body or agency (and, except with respect to a project assisted or to be assisted pursuant to

section 8 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f], which certifies that it is not receiving financial assistance from the United States exclusively pursuant to such Act [42 U.S.C.A. § 1437 et seq.]), a cooperative (including an investor-sponsor who meets such requirements as the Secretary may impose to assure that the consumer interest is protected), or a limited dividend corporation (as defined by the Secretary), or a private nonprofit corporation or association, or other mortgagor approved by the Secretary, and regulated or supervised under Federal or State laws or by political subdivisions of States, or agencies thereof, or by the Secretary under a regulatory agreement or otherwise, as to rents, charges, and methods of operation, in such form and in such manner as in the opinion of the Secretary will effectuate the purposes of this section—

(i) Repealed. Pub.L. 93-383, Title III, § 304(e)(1), Aug. 22, 1974, 88 Stat. 678

(ii)(I) not exceed, for such part of the property or project as may be attributable to dwelling use (excluding exterior land improvements as defined by the Secretary), $42,048 per family unit without a bedroom, $48,481 per family unit with one bedroom, 58,469 per family unit with two bedrooms, $74,840 per family unit with three bedrooms, and $83,375 per family unit with four or more bedrooms; except that as to projects to consist of elevator-type structures the Secretary may, in his discretion, increase the dollar amount limitations per family unit to not to exceed

$44,250 per family unit without a bedroom, $50,724 per family unit with one bedroom, $61,680 per family unit with two bedrooms, $79,793 per family unit with three bedrooms, and $87,588 per family unit with four or more bedrooms, as the case may be, to compensate for the higher costs incident to the construction of elevator-type structures of sound standards of construction and design; (II) the Secretary may, by regulation, increase any of the dollar amount limitations in subclause (I) (as such limitations may have been adjusted in accordance with section 1712a of this title) by not to exceed 170 percent in any geographical area where the Secretary finds that cost levels so require and by not to exceed 170 percent, or 215 percent in high cost areas, where the Secretary determines it necessary on a project-by-project basis, but in no case may any such increase exceed 90 percent where the Secretary determines that a mortgage purchased or to be purchased by the Government National Mortgage Association in implementing its special assistance functions under section 1720 of this title (as such section existed immediately before November 30, 1983) is involved; and

(iii) not exceed (1) in the case of new construction, the amount which the Secretary estimates will be the replacement cost of the property or project when the proposed improvements are completed (the replacement cost may include the land, the proposed physical improvements, utilities within the boundaries of the land, architect's fees, taxes, interest during

construction, and other miscellaneous charges incident to construction and approved by the Secretary), or (2) in the case of repair and rehabilitation, the sum of the estimated cost of repair and rehabilitation and the Secretary's estimate of the value of the property before repair and rehabilitation: *Provided,* That the mortgage may involve the financing of the purchase of property which has been rehabilitated by a local public agency with Federal assistance pursuant to section 110(c)(8) of the Housing Act of 1949, and, in such case, the amount of the mortgage shall not exceed the appraised value of the property as of the date the mortgage is accepted for insurance: *Provided further,* That in the case of any mortgagor other than a nonprofit corporation or association, cooperative (including an investor-sponsor), or public body, or a mortgagor meeting the special requirements of subsection (e)(1) of this section, the amount of the mortgage shall not exceed 90 per centum of the amount otherwise authorized under this section: *Provided further,* That such property or project, when constructed, or repaired and rehabilitated, shall be for use as a rental or cooperative project, and low and moderate income families or displaced families shall be eligible for occupancy in accordance with such regulations and procedures as may be prescribed by the Secretary and the Secretary may adopt such requirements as he determines to be desirable regarding consultation with local public officials where such consultation is appropriate by reason of the relationship of such project to projects under other local programs; or

(4) if executed by a mortgagor and which is approved by the Secretary—

(i) Repealed. Pub. L. 93-383, Title III, § 304(e)(2), Aug. 22, 1974, 88 Stat. 678.

(ii)(I) not exceed, for such part of the property or project as may be attributable to dwelling use (excluding exterior land improvements as defined by the Secretary), $37,843 per family unit without a bedroom, $42,954 per family unit with one bedroom, $51,920 per family unit with two bedrooms, $65,169 per family unit with three bedrooms, and $73,846 per family unit with four or more bedrooms; except that as to projects to consist of elevator-type structures the Secretary may, in his discretion, increase the dollar amount limitations per family unit to not to exceed $40,876 per family unit without a bedroom, $46,859 per family unit with one bedroom, $56,979 per family unit with two bedrooms, $73,710 per family unit with three bedrooms, and $80,913 per family unit with four or more bedrooms, as the case may be, to compensate for the higher costs incident to the construction of elevator-type structures of sound standards of construction and design; (II) the Secretary may, by regulation, increase any of the dollar limitations in subclause (I) (as such limitations may have been adjusted in accordance with section 1712a of this title) by not to exceed 170 percent in any geographical area where the Secretary finds that cost levels so require and by not to exceed 170 percent, or 215 percent in high cost areas, where the Secretary determines it

necessary on a project-by-project basis, but in no case may any such increase exceed 90 percent where the Secretary determines that a mortgage purchased or to be purchased by the Government National Mortgage Association in implementing its special assistance functions under section 1720 of this title (as such section existed immediately before November 30, 1983) is involved;

(iii) not exceed (in the case of a property or project approved for mortgage insurance prior to the beginning of construction) 90 per centum of the amount which the Secretary estimates will be the replacement cost of the property or project when the proposed improvements are completed (the replacement cost may include the land, the proposed physical improvements, utilities within the boundaries of the land, architect's fees, taxes, interest during construction, and other miscellaneous charges incident to construction and approved by the Secretary, and shall include an allowance for builder's and sponsor's profit and risk of 10 per centum of all of the foregoing items, except the land, unless the Secretary, after certification that such allowance is unreasonable, shall by regulation prescribe a lesser percentage); and

(iv) not exceed 90 per centum of the sum of the estimated cost of repair and rehabilitation (including the cost of evaluating and reducing lead-based paint hazards, as such terms are defined in section 4851b of Title 42) and the Secretary's estimate of the value of the property

before repair and rehabilitation if the proceeds of the mortgage are to be used for the repair and rehabilitation of a property or project: *Provided,* That the Secretary may, in his discretion, require the mortgagor to be regulated or restricted as to rents or sales, charges, capital structure, rate of return, and methods of operation, and for such purpose the Secretary may make such contracts with and acquire for not to exceed $100 such stock or interest in any such mortgagor as the Secretary may deem necessary to render effective such restrictions or regulations, with such stock or interest being paid for out of the General Insurance Fund and being required to be redeemed by the mortgagor at par upon the termination of all obligations of the Secretary under the insurance;

(5) bear interest at such rate as may be agreed upon by the mortgagor and the mortgagee; and contain such terms and provisions with respect to the application of the mortgagor's periodic payment to amortization of the principal of the mortgage, insurance, repairs, alterations, payment of taxes, default reserves, delinquency charges, foreclosure proceedings, anticipation of maturity, additional and secondary liens, and other matters as the Secretary may in his discretion prescribe: *Provided,* That a mortgage insured under the provisions of subsection (d)(3) of this section shall bear interest (exclusive of any premium charges for insurance and service charge, if any) at not less than the lower of (A) 3 per centum per annum, or (B) the annual rate of interest determined, from time to time by the Secretary of the Treasury at

the request of the Secretary, by estimating the average market yield to maturity on all outstanding marketable obligations of the United States, and by adjusting such yield to the nearest one-eighth of 1 per centum, and there shall be no differentiation in the rate of interest charged under this proviso as between mortgagors under subsection (d)(3) of this section on the basis of differences in the types or classes of such mortgagors; and

(6) provide for complete amortization by periodic payments (unless otherwise approved by the Secretary) within such terms as the Secretary may prescribe, but as to mortgages coming within the provisions of subsection (d)(2) of this section not to exceed from the date of the beginning of amortization of the mortgage (i) 40 years in the case of a displaced family, (ii) 35 years in the case of any other family if the mortgage is approved for insurance prior to construction, except that the period in such case may be increased to not more than 40 years where the mortgagor is not able, as determined by the Secretary, to make the required payments under a mortgage having a shorter amortization period, and (iii) 30 years in the case of any other family where the mortgage is not approved for insurance prior to construction.

(e) "Mortgagor" defined; release of mortgagor or part of property

(1) A mortgagor which may be approved by the Secretary as provided in subsection (d)(3) of this section includes a mortgagor which, as a condition of

obtaining insurance of the mortgage and prior to the submission of its application for such insurance, has entered into an agreement (in form and substance satisfactory to the Secretary) with a private nonprofit corporation eligible for an insured mortgage under the provisions of subsection (d)(3) of this section, that the mortgagor will sell the project when it is completed to the corporation at the actual cost of the project, as certified pursuant to section 1715r of this title. The mortgagor to whom the property is sold shall be regulated or supervised by the Secretary as provided in subsection (d)(3) of this section to effectuate its purposes.

(2) The Secretary may at any time, under such terms and conditions as he may prescribe, consent to the release of the mortgagor from his liability under the mortgage or the credit instrument secured thereby, or consent to the release of parts of the mortgaged property from the lien of the mortgage.

(f) Compliance with standards; nondwelling facilities in projects in urban renewal areas; number of family units; premium charges; housing for low-income purchasers; expiration of mortgage insurance authority; "family" defined; single occupants in subsection (d)(3) housing; use of certain housing facilities for classroom purposes; return of advances for capital improvements

The property or project shall comply with such standards and conditions as the Secretary may prescribe to establish the acceptability of such property for mortgage insurance and may include such commercial and community facilities as the

Secretary deems adequate to serve the occupants: *Provided,* That in the case of any such property or project located in an urban renewal area, the provisions of section 1715k(d)(3)(B)(iv) of this title shall apply with respect to the nondwelling facilities which may be included in the mortgage: *Provided further,* That, in the case of a mortgage which bears interest at the below-market interest rate prescribed in the proviso of subsection (d)(5) of this section, the provisions of section 1715k(d)(3)(B)(iv) of this title shall only apply if the mortgagor waives the right to receive dividends on its equity investment in the portion thereof devoted to commercial facilities.

A property or project covered by a mortgage insured under the provisions of subsection (d)(3) or (d)(4) of this section shall include five or more family units: *Provided,* That such units, in the case of a project designed primarily for occupancy by displaced, elderly, or handicapped families, need not, with the approval of the Secretary, contain kitchen facilities, and such projects may include central dining and other shared facilities. The Secretary is authorized to adopt such procedures and requirements as he determines are desirable to assure that the dwelling accommodations provided under this section are available to displaced families. Notwithstanding any provision of this chapter, the Secretary, in order to assist further the provision of housing for low and moderate income families, in his discretion and under such conditions as he may prescribe, may insure a mortgage which meets the requirements of subsection (d)(3) of this section as in effect after June 30, 1961, or which meets the requirements of subsection (h), (i), or (j) of this section, with no

premium charge, with a reduced premium charge, or with a premium charge for such period or periods during the time the insurance is in effect as the Secretary may determine, and there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts as may be necessary to reimburse the General Insurance Fund for any net losses in connection with such insurance. Any person who is sixty-two years of age or over, or who is a handicapped person within the meaning of section 1701q of this title, or who is a displaced person, shall be deemed to be a family within the meaning of the terms "family" and "families" as those terms are used in this section. Low- and moderate-income persons who are less than 62 years of age shall be eligible for occupancy of dwelling units in a project financed with a mortgage insured under subsection (d)(3) of this section. In any case in which it is determined in accordance with regulations of the Secretary that facilities in existence or under construction on December 31, 1970, which could appropriately be used for classroom purposes are available in any such property or project and that public schools in the community are overcrowded due in part to the attendance at such schools of residents of the property or project, such facilities may be used for such purposes to the extent permitted in such regulations (without being subject to any of the requirements of the proviso in section 1715k(d)(3)(B)(iv) of this title except the requirement that the project be predominantly residential).

As used in this section the terms "displaced family", "displaced families", and "displaced person" shall mean a family or families, or a person, displaced from an urban renewal area, or as a result of governmental action, or as a result of a major disaster as determined by the President pursuant to the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. § 5121 et seq.]

In order to induce advances by owners for capital improvements (excluding any owner contributions that may be required by the Secretary as a condition for assistance under section 201 of the Housing and Community Development Amendments of 1978) to benefit projects covered by a mortgage under the provisions of subsection (d)(3) of this section that bears a below market interest rate prescribed in the proviso to subsection (d)(5) of this section, in establishing the rental charge for the project the Secretary may include an amount that would permit a return of such advances with interest to the owner out of project income, on such terms and conditions as the Secretary may determine. Any resulting increase in rent contributions shall be—

(A) to a level not exceeding the lower of 30 percent of the adjusted income of the tenant or the published existing fair market rent for comparable housing established under section 8(c) of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f];

(B) phased in equally over a period of not less than 3 years, if such increase is 30 percent or more; and

(C) limited to not more than 10 percent per year if such increase is more than 10 percent but less than 30 percent.

Assistance under section 8 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f] shall be provided, to the extent available under appropriations Acts, if necessary to mitigate any adverse effects on income-eligible tenants.

(g) Entitlement of mortgagee to benefits; applicability of other provisions; debentures; "going Federal rate" defined; transfer of original credit instrument

The mortgagee shall be entitled to receive the benefits of the insurance as hereinafter provided—

(1) as to mortgages meeting the requirements of paragraph (2) of subsection (d) of this section, paragraph (5) of subsection (h) of this section, or paragraph (2) of subsection (i) of this section, as provided in section 1710(a) of this title with respect to mortgages insured under section 1709 of this title, and the provisions of subsections (b), (c), (d), (e), (f), (g), (h), (j), and (k) of section 1710 of this title shall be applicable to such mortgages insured under this section, except that all references therein to the Mutual Mortgage Insurance Fund or the Fund shall be construed to refer to the General Insurance Fund and all references therein to section 1709 of this title shall be construed to refer to this section; or

(2) as to mortgages meeting the requirements of paragraph (3) or (4) of subsection (d) of this section, paragraph (1) of subsection (h) of this section, or paragraph (2) of subsection (j) of this section, as provided in section 1713(g) of this title with respect to mortgages insured under said section 1713, and the provisions of subsections (h), (i), (j), (k), and (l) of section 1713 of this title shall be applicable to such mortgages insured under this section; or

(3) as to mortgages meeting the requirements of this section which are insured or initially endorsed for insurance on or after June 30, 1961, notwithstanding the provisions of paragraphs (1) and (2) of this subsection, the Secretary in his discretion, in accordance with such regulations as he may prescribe, may make payments pursuant to such paragraphs in cash or in debentures (as provided in the mortgage insurance contract), or may acquire a mortgage loan that is in default and the security therefor upon payment to the mortgagee in cash or in debentures (as provided in the mortgage insurance contract) of a total amount equal to the unpaid principal balance of the loan plus any accrued interest and any advances approved by the Secretary and made previously by the mortgagee under the provisions of the mortgage, and after the acquisition of any such mortgage by the Secretary the mortgagee shall have no further rights, liabilities, or obligations with respect to the loan or the security for the loan. The appropriate provisions of sections 1710 and 1713 of this title relating to the issuance of debentures shall apply with respect to debentures issued under this paragraph, and the appropriate

provisions of sections 1710 and 1713 of this title relating to the rights, liabilities, and obligations of a mortgagee shall apply with respect to the Secretary when he has acquired an insured mortgage under this paragraph, in accordance with and subject to regulations (modifying such provisions to the extent necessary to render their application for such purposes appropriate and effective) which shall be prescribed by the Secretary, except that as applied to mortgages so acquired (A) all references in section 1710 of this title to the Mutual Mortgage Insurance Fund or the Fund shall be construed to refer to the General Insurance Fund, and (B) all references in section 1710 of this title to section 1709 of this title shall be construed to refer to this section. If the insurance is paid in cash, there shall be added to such payment an amount equivalent to the interest which the debentures would have earned, computed to a date to be established pursuant to regulations issued by the Secretary.

(4)(A) in the event any mortgage insured under this section pursuant to a commitment to insure entered into before November 30, 1983, is not in default at the expiration of twenty years from the date the mortgage was endorsed for insurance, the mortgagee shall, within a period thereafter to be determined by the Secretary, have the option to assign, transfer, and deliver to the Secretary the original credit instrument and the mortgage securing the same and receive the benefits of the insurance as hereinafter provided in this paragraph, upon compliance with such requirements and conditions as to the validity of

the mortgage as a first lien and such other matters as may be prescribed by the Secretary at the time the loan is endorsed for insurance. Upon such assignment, transfer, and delivery the obligation of the mortgagee to pay the premium charges for insurance shall cease, and the Secretary shall issue to the mortgagee debentures having a par value equal to the amount of the original principal obligation of the mortgage which was unpaid on the date of the assignment, plus accrued interest to such date. Debentures issued pursuant to this paragraph shall be issued in the same manner and subject to the same terms and conditions as debentures issued under paragraph (1) of this subsection, except that the debentures issued pursuant to this paragraph shall be dated as of the date the mortgage is assigned to the Secretary, shall mature ten years after such date, and shall bear interest from such date at the going Federal rate determined at the time of issuance. The term "going Federal rate" as used herein means the annual rate of interest which the Secretary of the Treasury shall specify as applicable to the six-month period (consisting of January through June or July through December) which includes the issuance date of such debentures, which applicable rate for each such six-month period shall be determined by the Secretary of the Treasury by estimating the average yield to maturity, on the basis of daily closing market bid quotations or prices during the month of May or the month of November, as the case may be, next preceding such six-month period, on all outstanding marketable obligations of the United States having a maturity date of eight to twelve years from the first day of

such month of May or November (or, if no such obligations are outstanding, the obligation next shorter than eight years and the obligation next longer than twelve years, respectively, shall be used), and by adjusting such estimated average annual yield to the nearest one-eight of 1 per centum. The Secretary shall have the same authority with respect to mortgages assigned to him under this paragraph as contained in sections 1713(k) and 1713(l) of this title as to mortgages insured by the Secretary and assigned to him under section 1713 of this title.

(B) In processing a claim for insurance benefits under this paragraph, the Secretary may direct the mortgagee to assign, transfer, and deliver the original credit instrument and the mortgage securing it directly to the Government National Mortgage Association in lieu of assigning, transferring, and delivering the credit instrument and the mortgage to the Secretary. Upon the assignment, transfer, and delivery of the credit instrument and the mortgage to the Association, the mortgage insurance contract shall terminate and the mortgagee shall receive insurance benefits as provided in subparagraph (A). The Association is authorized to accept such loan documents in its own name and to hold, service, and sell such loans as agent for the Secretary. The mortgagor's obligation to pay a service charge in lieu of a mortgage insurance premium shall continue as long as the mortgage is held by the Association or by the Secretary. The Secretary shall have the same authority with respect to mortgages assigned to the Secretary or the Association under this

subparagraph as provided by section 1715n(c) of this title.

(C)(i) In lieu of accepting assignment of the original credit instrument and the mortgage securing the credit instrument under subparagraph (A) in exchange for receipt of debentures, the Secretary shall arrange for the sale of the beneficial interests in the mortgage loan through an auction and sale of the (I) mortgage loans, or (II) participation certificates, or other mortgage-backed obligations in a form acceptable to the Secretary (in this subparagraph referred to as "participation certificates"). The Secretary shall arrange the auction and sale at a price, to be paid to the mortgagee, of par plus accrued interest to the date of sale. The sale price shall also include the right to a subsidy payment described in clause (iii).

(ii)(I) The Secretary shall conduct a public auction to determine the lowest interest rate necessary to accomplish a sale of the beneficial interests in the original credit instrument and mortgage securing the credit instrument.

(II) A mortgagee who elects to assign a mortgage shall provide the Secretary and persons bidding at the auction a description of the characteristics of the original credit instrument and mortgage securing the original credit instrument, which shall include the principal mortgage balance, original stated interest rate, service fees, real estate and tenant characteristics, the level and duration of applicable Federal subsidies, and any

other information determined by the Secretary to be appropriate. The Secretary shall also provide information regarding the status of the property with respect to the provisions of the Emergency Low Income Housing Preservation Act of 1987 or any subsequent Act with respect to eligibility to prepay the mortgage, a statement of whether the owner has filed a notice of intent to prepay or a plan of action under the Emergency Low Income Housing Preservation Act of 1987 or any subsequent Act, and the details with respect to incentives provided under the Emergency Low Income Housing Preservation Act of 1987 or any subsequent Act in lieu of exercising prepayment rights.

(III) The Secretary shall, upon receipt of the information in subclause (II), promptly advertise for an auction and publish such mortgage descriptions in advance of the auction. The Secretary may conduct the auction at any time during the 6-month period beginning upon receipt of the information in subclause (II) but under no circumstances may the Secretary conduct an auction before 2 months after receiving the mortgagee's written notice of intent to assign its mortgage to the Secretary.

(IV) In any auction under this subparagraph, the Secretary shall accept the lowest interest rate bid for purchase that the Secretary determines to be acceptable. The Secretary shall cause the accepted bid to be published in the Federal Register. Settlement for the sale of the credit instrument and the mortgage securing the credit instrument

shall occur not later than 30 business days after the date winning bidders are selected in the auction, unless the Secretary determines that extraordinary circumstances require an extension (not to exceed 60 days) of the period.

(V) If no bids are received, the bids that are received are not acceptable to the Secretary, or settlement does not occur within the period under subclause (IV), the mortgagee shall retain all rights (including the right to interest, at a rate to be determined by the Secretary, for the period covering any actions taken under this subparagraph) under this section to assign the mortgage loan to the Secretary.

(iii) As part of the auction process, the Secretary shall agree to provide a monthly interest subsidy payment from the General Insurance Fund to the purchaser under the auction of the original credit instrument or the mortgage securing the credit instrument (and any subsequent holders or assigns who are approved mortgagees). The subsidy payment shall be paid on the first day of each month in an amount equal to the difference between the stated interest due on the mortgage loan and the lowest interest rate necessary to accomplish a sale of the mortgage loan or participation certificates (less the servicing fee, if appropriate) for the then unpaid principal balance plus accrued interest at a rate determined by the Secretary. Each interest subsidy payment shall be treated by the holder of the mortgage as interest paid on the mortgage. The interest subsidy payment shall be provided until the earlier of—

(I) the maturity date of the loan;

(II) prepayment of the mortgage loan in accordance with the Emergency Low Income Housing Preservation Act of 1987 or any subsequent Act, where applicable; or

(III) default and full payment of insurance benefits on the mortgage loan by the Federal Housing Administration.

(iv) The Secretary shall require that the mortgage loans or participation certificates presented for assignment are auctioned as whole loans with servicing rights released and also are auctioned with servicing rights retained by the current servicer.

(v) To the extent practicable, the Secretary shall encourage State housing finance agencies, nonprofit organizations, and organizations representing the tenants of the property securing the mortgage, or a qualified mortgagee participating in a plan of action under the Emergency Low Income Housing Preservation Act of 1987 or subsequent Act to participate in the auction.

(vi) The Secretary shall implement the requirements imposed by this subparagraph within 30 days from November 5, 1990, and not be subject to the requirement of prior issuance of regulations in the Federal Register. The Secretary shall issue regulations implementing this section within 6 months of November 5, 1990.

(vii) Nothing in this subparagraph shall diminish or impair the low income use restrictions applicable to the project under the original regulatory agreement or the revised agreement entered into pursuant to the Emergency Low Income Housing Preservation Act of 1987 or subsequent Act, if any, or other agreements for the provision of Federal assistance to the housing or its tenants.

(viii) This subparagraph shall not apply after December 31, 2002, except that this subparagraph shall continue to apply if the Secretary receives a mortgagee's written notice of intent to assign its mortgage to the Secretary on or before such date. Not later than January 31 of each year (beginning in 1992), the Secretary shall submit to the Congress a report including statements of the number of mortgages auctioned and sold and their value, the amount of subsidies committed to the program under this subparagraph, the ability of the Secretary to coordinate the program with the incentives provided under the Emergency Low Income Housing Preservation Act of 1987 or subsequent Act, and the costs and benefits derived from the program for the Federal Government.

(ix) The authority of the Secretary to conduct multifamily auctions under this paragraph shall be effective for any fiscal year only to the extent and in such amounts as are approved in appropriations Acts for the costs of loan guarantees (as defined in section 661a of Title 2), including the cost of modifying loans.

(h) Insurance of mortgages to finance purchase and rehabilitation by nonprofit organizations of housing for resale to low-income purchasers, and insurance of mortgages executed for the purpose of financing rehabilitation or improvement of dwellings owned and occupied by mortgagors who purchased from nonprofit organizations

(1) In addition to mortgages insured under the other provisions of this section, the Secretary is authorized, upon application by the mortgagee, to insure under this subsection as hereinafter provided any mortgage (including advances under such mortgage during rehabilitation) which is executed by a nonprofit organization to finance the purchase and rehabilitation of deteriorating or substandard housing for subsequent resale to low-income home purchasers and, upon such terms and conditions as the Secretary may prescribe, to make commitments for the insurance of such mortgages prior to the date of their execution or disbursement thereon.

(2) To be eligible for insurance under paragraph (1) of this subsection, a mortgage shall—

(A) be executed by a private nonprofit corporation or association, approved by the Secretary, for financing the purchase and rehabilitation (with the intention of subsequent resale) of property comprising one or more tracts or parcels, whether or not contiguous, upon which there is located deteriorating or substandard housing consisting of (i) four or more single-family dwellings of detached, semidetached, or row construction, or (ii) four or more one-family units in a structure or structures

for which a plan of family unit ownership approved by the Secretary is established;

(B) be secured by the property which is to be purchased and rehabilitated with the proceeds thereof;

(C) be in a principal amount not exceeding the appraised value of the property at the time of its purchase under the mortgage plus the estimated cost of the rehabilitation;

(D) bear interest (exclusive of premium charges for insurance and service charge, if any) at the rate in effect under the proviso in subsection (d)(5) of this section at the time of execution;

(E) provide for complete amortization (subject to paragraph (5)(E)) by periodic payments within such term as the Secretary may prescribe; and

(F) provide for the release of individual single-family dwellings from the lien of the mortgage upon the sale of the rehabilitated dwellings in accordance with paragraph (5).

(3) No mortgage shall be insured under paragraph (1) unless the mortgagor shall have demonstrated to the satisfaction of the Secretary that (A) the property to be rehabilitated is located in a neighborhood which is sufficiently stable and contains sufficient public facilities and amenities to support long-term values, or (B) the rehabilitation to be carried out by the mortgagor plus its related activities and the activities of other owners of

housing in the neighborhood, together with actions to be taken by public authorities, will be of such scope and quality as to give reasonable promise that a stable environment will be created in the neighborhood.

(4) The aggregate principal balance of all mortgages insured under paragraph (1) and outstanding at any one time shall not exceed $50,000,000.

(5)(A) No mortgage shall be insured under paragraph (1) unless the mortgagor enters into an agreement (in form and substance satisfactory to the Secretary) that it will offer to sell the dwellings involved, upon completion of their rehabilitation, to individuals or families (hereinafter referred to as "low-income purchasers") determined by the Secretary to have incomes below the maximum amount specified (with respect to the area involved) in section 1701s(c)(1) of this title.

(B) The Secretary is authorized to insure under this paragraph mortgages executed to finance the sale of individual dwellings to low-income purchasers as provided in subparagraph (A). Any such mortgage shall—

(i) be in a principal amount equal to that portion of the unpaid balance of the principal mortgage covering the property (insured under paragraph (1)) which is allocable to the individual dwelling involved; and

(ii) bear interest at the same rate as the principal mortgage or such lower rate, not less than 1 per centum, as the Secretary may prescribe if in his judgment the purchaser's income is sufficiently low to justify the lower rate, and provide for complete amortization within a term equal to the remaining term (determined without regard to subparagraph (E)) of such principal mortgage: *Provided,* That, if the rate of interest initially prescribed is less than the rate borne by the principal mortgage and the purchaser's income (as determined on the basis of periodic review) subsequently rises, the rate of interest so prescribed shall be increased (but not above the rate borne by such principal mortgage), under regulations of the Secretary, to the extent appropriate to reflect the increase in such income, and the mortgage shall so provide.

(C) The price for which any individual dwelling is sold to a low-income purchaser under this paragraph shall be the amount of the mortgage covering the sale as determined under subparagraph (B), except that the purchaser shall in addition thereto be required to pay on account of the property at the time of purchase such amount (which shall not be less than $200, but which may be applied in whole or in part toward closing costs) as the Secretary may determine to be reasonable and appropriate in the circumstances.

(D) Upon the sale under this paragraph of any individual dwelling, such dwelling shall be released from the lien of the principal mortgage, and such mortgage shall thereupon be replaced by an individual mortgage insured under this paragraph to

the extent of the portion of its unpaid balance which is allocable to the dwelling covered by such individual mortgage. Until all of the individual dwellings in the property covered by the principal mortgage have been sold, the mortgagor shall hold and operate the dwellings remaining unsold at any given time as though they constituted rental units in a project covered by a mortgage which is insured under subsection (d)(3) of this section (and which receives the benefits of the interest rate provided for in the proviso in subsection (d)(5) of this section).

(E) Upon the sale under this paragraph of all of the individual dwellings in the property covered by the principal mortgage, and the release of all individual dwellings from the lien of the principal mortgage, the insurance of the principal mortgage shall be terminated and no adjusted premium charge shall be charged by the Secretary upon such termination.

(F) Any mortgage insured under this paragraph shall contain a provision that if the low-income mortgagor does not continue to occupy the property the interest rate shall increase to the highest rate permissible under this section and the regulations of the Secretary effective at the time of commitment for insurance of the principal mortgage; except that the increase in interest rate shall not be applicable if the property is sold and the purchaser is (i) the nonprofit organization which executed the principal mortgage, (ii) a public housing agency having jurisdiction under the United States Housing Act of 1937 [42 U.S.C.A. § 1437 et seq.] over the area where the dwelling is located, or (iii) a low-income purchaser

approved for the purposes of this paragraph by the Secretary.

(6) In addition to the mortgages that may be insured under paragraphs (1) and (5), the Secretary is authorized to insure under this subsection at any time within one year after August 1, 1968, upon such terms and conditions as he may prescribe, mortgages which are executed by individuals or families that meet the income criteria prescribed in paragraph (5)(A) and are executed for the purpose of financing the rehabilitation or improvement of single-family dwellings of detached, semidetached, or row construction that are owned in each instance by a mortgagor who has purchased the dwelling from a nonprofit organization of the type described in this subsection. To be eligible for such insurance, a mortgage shall—

(A) be in a principal amount not exceeding the lesser of $18,000 or the sum of the estimated cost of repair and rehabilitation and the Secretary's estimate of the value of the property before repair and rehabilitation, except that in no case involving refinancing shall such mortgage exceed such estimated cost of repair and rehabilitation and the amount (as determined by the Secretary) required to refinance existing indebtedness secured by the property;

(B) bear interest (exclusive of premium charges for insurance and service charge, if any) at 3 per centum per annum or such lower rate, not less than 1 per centum, as the Secretary may prescribe if in his judgment the mortgagor's income is

sufficiently low to justify the lower rate: *Provided*, That, if the rate of interest initially prescribed is less than 3 per centum per annum and the mortgagor's income (as determined on the basis of periodic review) subsequently rises, the rate shall be increased (but not above 3 per centum), under regulations of the Secretary, to the extent appropriate to reflect the increase in such income, and the mortgage shall so provide;

(C) involve a mortgagor that shall have paid on account of the property at the time of the rehabilitation such amount (which shall not be less than $200 in cash or its equivalent, but which may be applied in whole or in part toward closing costs) as the Secretary may determine to be reasonable and appropriate under the circumstances; and

(D) contain a provision that, if the low-income mortgagor does not continue to occupy the property, the interest rate shall increase to the highest rate permissible under this section and the regulations of the Secretary effective at the time the commitment was issued for insurance of the mortgage; except that the increase in interest rate shall not be applicable if the property is sold and the purchaser is (i) a nonprofit organization which has been engaged in purchasing and rehabilitating deteriorating and substandard housing with financing under a mortgage insured under paragraph (1) of this subsection, (ii) a public housing agency having jurisdiction under the United States Housing Act of 1937 [42 U.S.C.A. § 1437 et seq.] over the area where the dwelling is located, or (iii) a low-income purchaser approved

for the purposes of this paragraph by the Secretary.

(7) Where the Secretary has approved a plan of family unit ownership, the terms "single-family dwelling", "single-family dwellings", "individual dwelling", and "individual dwellings" shall mean a family unit or family units, together with the undivided interest (or interests) in the common areas and facilities.

(8) For purposes of this subsection, the terms "single-family dwelling" and "single-family dwellings" (except for purposes of paragraph (7)) shall include a two-family dwelling which has been approved by the Secretary.

(i) Conversion of insured project to plan of family unit ownership; sale of units; agreements for maintenance; release from lien of project mortgage; insurance of mortgages financing purchase of individual family units; eligibility for insurance; definitions

(1) The Secretary is authorized, with respect to any project involving a mortgage insured under subsection (d)(3) of this section which bears interest at the below-market interest rate prescribed in the proviso of subsection (d)(5) of this section, to permit a conversion of the ownership of such project to a plan of family unit ownership. Under such plan, each family unit shall be eligible for individual ownership and provision shall be included for the sale of the family units, together with an undivided interest in the common areas and facilities which serve the

project, to low or moderate income purchasers. The Secretary shall obtain such agreements as he determines to be necessary to assure continued maintenance of the common areas and facilities. Upon such sale, the family unit and the undivided interest in the common areas shall be released from the lien of the project mortgage.

(2)(A) The Secretary is authorized, upon application by the mortgagee, to insure under this subsection mortgages financing the purchase of individual family units under the plan prescribed in paragraph (1). Commitments may be issued by the Secretary for the insurance of such mortgages prior to the date of their execution or disbursement thereon, upon such terms and conditions as the Secretary may prescribe. To be eligible for such insurance, the mortgage shall—

(i) be executed by a mortgagor having an income within the limits prescribed by the Secretary for occupants of projects financed with a mortgage insured under subsection (d)(3) of this section which bears interest at the below-market rate prescribed in the proviso of subsection (d)(5) of this section;

(ii) involve a principal obligation (including such initial service charges, and such appraisal, inspection, and other fees, as the Secretary shall approve) in an amount not to exceed the Secretary's estimate of the appraised value of the family unit, including the mortgagor's interest in the common areas and facilities, as of the date the mortgage is accepted for insurance;

(iii) bear interest at a rate determined by the Secretary (which may vary in accordance with the regulations of the Secretary promulgated pursuant to the last sentence of paragraph (4) of this subsection) but not less than the below-market rate in effect under the proviso of subsection (d)(5) of this section at the date of the commitment for insurance; and

(iv) provide for complete amortization by periodic payments within such term as the Secretary may prescribe, but not to exceed forty years from the beginning of amortization of the mortgage.

(B) The price for which the individual family unit is sold to the low or moderate income purchaser shall not exceed the appraised value of the property, as determined under subparagraph (A)(ii), except that the purchaser shall be required to pay on account of the property at the time of purchase at least such amount, in cash or its equivalent (which shall be not less than 3 per centum of such price, but which may be applied in whole or in part toward closing costs), as the Secretary may determine to be reasonable and appropriate.

(3) Upon the sale of all of the family units covered by the project mortgage, and the release of all of the family units (including the undivided interest allocable to each unit in the common areas and facilities) from the lien of the project mortgage, the insurance of the project mortgage shall be terminated and no adjusted premium charge shall be collected by the Secretary upon such termination.

(4) Any mortgage covering an individual family unit

insured under this subsection shall contain a provision that, if the original mortgagor does not continue to occupy the property, the interest rate shall increase to the highest rate permissible under this section and the regulations of the Secretary effective at the time the commitment was issued for the insurance of the project mortgage; except that the requirement for an increase in interest rate shall not be applicable if the property is sold and the purchaser is (i) a nonprofit purchaser approved by the Secretary, or (ii) a low or moderate income purchaser who has an income within the limits prescribed by the Secretary for occupants of projects financed with a mortgage insured under subsection (d)(3) of this section which bears interest at the below-market rate prescribed in the proviso of subsection (d)(5) of this section. The mortgage shall also contain a provision that, if the Secretary determines that the annual income of the original mortgagor (or a purchaser described in clause (ii) of the preceding sentence) has increased to an amount enabling payment of a greater rate of interest, the interest rate of the individual mortgage may be increased up to the highest rate permissible under the regulations of the Secretary for mortgages insured under this section, effective at the time the commitment was issued for the insurance of the mortgage.

(5) For the purpose of this subsection—

(i) the term "mortgage", when used in relation to a mortgage insured under paragraph (2) of this subsection, includes a first mortgage given to secure the unpaid purchase price of a fee interest

in, or a long-term lease-hold interest in, a one-family unit in a multifamily project and an undivided interest in the common areas and facilities which serve the project; and

(ii) the term "common areas and facilities" includes the land and such commercial, community, and other facilities as are approved by the Secretary.

(j) Conversion of insured rental projects to cooperatives; eligibility for membership; insurance of cooperative mortgages financing purchase of projects; eligibility for insurance

(1) The Secretary is authorized, with respect to any rental project involving a mortgage insured under subsection (d)(3) of this section which bears interest at the below-market interest rate prescribed in the proviso of subsection (d)(5) of this section, to permit a conversion of the ownership of such project to a cooperative approved by the Secretary. Membership in such cooperative shall be made available only to those families having an income within the limits prescribed by the Secretary for occupants of projects financed with a mortgage insured under subsection (d)(3) of this section which bears interest at such below-market rate: *Provided,* That families residing in the rental project at the time of its conversion to a cooperative who do not meet such income limits may be permitted to become members in the cooperative under such special terms and conditions as the Secretary may prescribe.

(2) The Secretary is authorized, upon application by the mortgagee, to insure under this subsection cooperative mortgages financing the purchase of projects meeting the requirements of paragraph (1). Commitments may be issued by the Secretary for the insurance of such mortgages prior to the date of their execution or disbursement thereon, upon such terms and conditions as the Secretary may prescribe. To be eligible for such insurance, the mortgage shall-

(i) involve a principal obligation (including such initial service charges and appraisal, inspection, and other fees as the Secretary shall approve) in an amount not exceeding the appraised value of the property for continued use as a cooperative, which value shall be based upon a mortgage amount on which the debt service can be met from the income of the property when operated on a nonprofit basis, after the payment of all operating expenses, taxes, and required reserves;

(ii) bear interest at the below-market rate prescribed in the proviso of subsection (d)(5) of this section; and

(iii) provide for complete amortization within such term as the Secretary may prescribe.

(k) Increase in maximum insurance amounts for costs incurred from solar energy systems and energy conservation measures

With respect to any project insured under subsection (d)(3) or (d)(4) of this section, the Secretary may further increase the dollar amount limitations which

would otherwise apply for the purpose of those subsections by up to 20 per centum if such increase is necessary to account for the increased cost of the project due to the installation therein of a solar energy system (as defined in subparagraph (3) of the last paragraph of section 1703(a) of this title) or residential energy conservation measures (as defined in section 8211(11)(A) through (G) and (I) of Title 42) in cases where the Secretary determines that such measures are in addition to those required under the minimum property standards and will be cost-effective over the life of the measure.

(l) Rental charges; "eligible multifamily housing" defined

(1) Notwithstanding any other provision of law, tenants residing in eligible multifamily housing whose incomes exceed 80 percent of area median income shall pay as rent not more than the lower of the following amounts: (A) 30 percent of the family's adjusted monthly income; or (B) the relevant fair market rental established under section 8(b) of the United States Housing Act of 1937 [42 U.S.C.A. § 1437f(b)] for the jurisdiction in which the housing is located. An owner shall phase in any increase in rents for current tenants resulting from this subsection.

(2) For purposes of this subsection, the term "eligible multifamily housing" means any housing financed by a loan or mortgage that is (A) insured or held by the Secretary under subsection (d)(3) of this section and assisted under section 1701s of this title or section 8 of the United States Housing Act of 1937 [42

U.S.C.A. § 1437f]; or (B) insured or held by the Secretary and bears interest at a rate determined under the proviso of subsection (d)(5) of this section.

APPENDIX I – 12 U.S.C. § 1735f-19

§ 1735f-19. Partial payment of claims on defaulted mortgages and in connection with mortgage restructuring

(a) Defaulted mortgages

Notwithstanding any other provision of law, if the Secretary is requested to accept assignment of a mortgage insured by the Secretary that covers a multifamily housing project (as such term is defined in section 1701z-11(b) of this title) or a health care facility (including a nursing home, intermediate care facility, or board and care home (as those terms are defined in section 1715w of this title), a hospital (as that term is defined in section 1715z-7 of this title), or a group practice facility (as that term is defined in section 1749aaa-5 of this title)) and the Secretary determines that partial payment would be less costly to the Federal Government than other reasonable alternatives for maintaining the low-income character of the project, or for keeping the health care facility operational to serve community needs, the Secretary may request the mortgagee, in lieu of assignment, to—

(1) accept partial payment of the claim under the mortgage insurance contract; and

(2) recast the mortgage, under such terms and conditions as the Secretary may determine.

(b) Existing mortgages.

Notwithstanding any other provision of law, the Secretary, in connection with a mortgage restructuring under section 514 of the Multifamily Assisted Housing Reform and Affordability Act of 1997, may make a one time, non-default partial or full payment of claim under one or more mortgage insurance contracts, which shall include a determination by the Secretary or the participating administrative entity, in accordance with the Multifamily Assisted Housing Reform and Affordability Act of 1997, of the market value of the project and a restructuring of the mortgage, under such terms and conditions as are permitted by section 517(a) of such Act.

(c) Repayment

As a condition to a partial claim payment under this section, the mortgagor shall agree to repay to the Secretary the amount of such payment and such obligation shall be secured by a second mortgage on the property on such terms and conditions as the Secretary may determine.

APPENDIX J - 42 U.S.C. 1437f note

Subtitle A—FHA-insured Multifamily Housing Mortgage and Housing Assistance Restructuring

Sec. 511. Findings and purposes.

(a) Findings.—Congress finds that—

(1) there exists throughout the Nation a need for decent, safe, and affordable housing;

(2) as of the date of enactment of this Act [Oct. 27, 1997], it is estimated that—

(A) the insured multifamily housing portfolio of the Federal Housing Administration consists of 14,000 rental properties, with an aggregate unpaid principal mortgage balance of $38,000,000,000; and

(B) approximately 10,000 of these properties contain housing units that are assisted with project-based rental assistance under section 8 of the United States Housing Act of 1937 [this section];

(3) FHA-insured multifamily rental properties are a major Federal investment, providing affordable rental housing to an estimated 2,000,000 low- and very low-income families;

(4) approximately 1,600,000 of these families live in dwelling units that are assisted with project-

based rental assistance under section 8 of the United States Housing Act of 1937 [this section];

(5) a substantial number of housing units receiving project-based assistance have rents that are higher than the rents of comparable, unassisted rental units in the same housing rental market;

(6) many of the contracts for project-based assistance will expire during the several years following the date of enactment of this Act [Oct. 27, 1997];

(7) it is estimated that—

(A) if no changes in the terms and conditions of the contracts for project-based assistance are made before fiscal year 2000, the cost of renewing all expiring rental assistance contracts under section 8 of the United States Housing Act of 1937 [this section] for both project-based and tenant-based rental assistance will increase from approximately $3,600,000,000 in fiscal year 1997 to over $14,300,000,000 by fiscal year 2000 and some $22,400,000,000 in fiscal year 2006;

(B) of those renewal amounts, the cost of renewing project-based assistance will increase from $1,200,000,000 in fiscal year 1997 to almost $7,400,000,000 by fiscal year 2006; and

(C) without changes in the manner in which project-based rental assistance is provided, renewals of expiring contracts for project-based rental assistance will require an increasingly

larger portion of the discretionary budget authority of the Department of Housing and Urban Development in each subsequent fiscal year for the foreseeable future;

(8) absent new budget authority for the renewal of expiring rental contracts for project-based assistance, many of the FHA-insured multifamily housing projects that are assisted with project-based assistance are likely to default on their FHA-insured mortgage payments, resulting in substantial claims to the FHA General Insurance Fund and Special Risk Insurance Fund;

(9) more than 15 percent of federally assisted multifamily housing projects are physically or financially distressed, including a number which suffer from mismanagement;

(10) due to Federal budget constraints, the downsizing of the Department of Housing and Urban Development, and diminished administrative capacity, the Department lacks the ability to ensure the continued economic and physical well-being of the stock of federally insured and assisted multifamily housing projects;

(11) the economic, physical, and management problems facing the stock of federally insured and assisted multifamily housing projects will be best served by reforms that—

(A) reduce the cost of Federal rental assistance, including project-based assistance, to these projects by reducing the debt service and

operating costs of these projects while retaining the low-income affordability and availability of this housing;

(B) address physical and economic distress of this housing and the failure of some project managers and owners of projects to comply with management and ownership rules and requirements; and

(C) transfer and share many of the loan and contract administration functions and responsibilities of the Secretary to and with capable State, local, and other entities; and

(12) the authority and duties of the Secretary, not including the control by the Secretary of applicable accounts in the Treasury of the United States, may be delegated to State, local or other entities at the discretion of the Secretary, to the extent the Secretary determines, and for the purpose of carrying out this title [this note], so that the Secretary has the discretion to be relieved of processing and approving any document or action required by these reforms.

(b) **Purposes.**—Consistent with the purposes and requirements of the Government Performance and Results Act of 1993 [Pub.L. 103-62, Aug. 3, 1993, 107 Stat. 285], the purposes of this subtitle are—

(1) to preserve low-income rental housing affordability and availability while reducing the long-term costs of project-based assistance;

(2) to reform the design and operation of Federal rental housing assistance programs, administered by the Secretary, to promote greater multifamily housing project operating and cost efficiencies;

(3) to encourage owners of eligible multifamily housing projects to restructure their FHA-insured mortgages and project-based assistance contracts in a manner that is consistent with this subtitle before the year in which the contract expires;

(4) to reduce the cost of insurance claims under the National Housing Act [Act June 27, 1934, c. 847, 48 Stat. 1246; see tables for classification] related to mortgages insured by the Secretary and used to finance eligible multifamily housing projects;

(5) to streamline and improve federally insured and assisted multifamily housing project oversight and administration;

(6) to resolve the problems affecting financially and physically troubled federally insured and assisted multifamily housing projects through cooperation with residents, owners, State and local governments, and other interested entities and individuals;

(7) to protect the interest of project owners and managers, because they are partners of the Federal Government in meeting the affordable housing needs of the Nation through the section 8 rental housing assistance program;

(8) to protect the interest of tenants residing in the multifamily housing projects at the time of the restructuring for the housing; and

(9) to grant additional enforcement tools to use against those who violate agreements and program requirements, in order to ensure that the public interest is safeguarded and that Federal multifamily housing programs serve their intended purposes.

Sec. 512. Definitions.

In this subtitle:

(1) **Comparable properties.**—The term comparable properties' means properties in the same market areas, where practicable, that—

(A) are similar to the eligible multifamily housing project as to neighborhood (including risk of crime), type of location, access, street appeal, age, property size, apartment mix, physical configuration, property and unit amenities, utilities, and other relevant characteristics; and

(B) are not receiving project-based assistance.

(2) **Eligible multifamily housing project.**—The term 'eligible multifamily housing project' means a property consisting of more than 4 dwelling units—

(A) with rents that, on an average per unit or per room basis, exceed the rent of comparable properties in the same market area, determined in accordance with guidelines established by the Secretary;

(B) that is covered in whole or in part by a contract for project-based assistance under—

(i) the new construction or substantial rehabilitation program under section 8(b)(2) of the United States Housing Act of 1937 [subsec. (b)(2) of this section](as in effect before October 1, 1983);

(ii) the property disposition program under section 8(b) of the United States Housing Act of 1937 [subsec. (b) of this section];

(iii) the moderate rehabilitation program under section 8(e)(2) of the United States Housing Act of 1937 [subsec. (e)(2) of this section];

(iv) the loan management assistance program under section 8 of the United States Housing Act of 1937 [this section];

(v) section 23 of the United States Housing Act of 1937 [section 1437u of this title] (as in effect before January 1, 1975);

(vi) the rent supplement program under section 101 of the Housing and Urban Development Act of 1965 [section 1701s of Title 12]; or

(vii) section 8 of the United States Housing Act of 1937 [this section], following conversion from assistance under section 101 of the Housing and Urban Development Act of 1965 [section 1701s of Title 12]; and

(C) financed by a mortgage insured or held by the Secretary under the National Housing Act [Act June 27, 1934, c. 847, 48 Stat. 1246].

Such term does not include any project with an expiring contract described in paragraph (1) or (2) of section 524(e), but does include a project described in section 524(e)(3) [of this note]. Notwithstanding any other provision of this title, the Secretary may treat a project as an eligible multifamily housing project for purposes of this title if (I) the project is assisted pursuant to a contract for project-based assistance under section 8 of the United States Housing Act of 1937 renewed under section 524 of this Act [section 524 of this note], (II) the owner consents to such treatment, and (III) the project met the requirements of the first sentence of this paragraph for eligibility as an eligible multifamily housing project before the initial renewal of the contract under section 524.

(3) Expiring contract.—The term 'expiring contract' means a project-based assistance contract attached to an eligible multifamily housing project which, under the terms of the contract, will expire.

(4) Expiration date.—The term 'expiration date' means the date on which an expiring contract expires.

(5) Fair market rent.—The term 'fair market rent' means the fair market rental established under section 8(c) of the United States Housing Act of 1937 [subsec. (c) of this section].

(6) Low-income families.—The term 'low-income families' has the same meaning as provided under section 3(b)(2) of the United States Housing Act of 1937 [section 1437a(b)(2) of this title].

(7) Mortgage restructuring and rental assistance sufficiency plan.—The term 'mortgage restructuring and rental assistance sufficiency plan' means the plan as provided under section 514 [section 514 of Pub.L. 105-65 set out in this note].

(8) Nonprofit organization.—The term 'nonprofit organization' means any private nonprofit organization that—

(A) is organized under State or local laws;

(B) has no part of its net earnings inuring to the benefit of any member, founder, contributor, or individual; and

(C) has a long-term record of service in providing or financing quality affordable housing for low-income families through relationships with public entities.

(9) Portfolio restructuring agreement.—The term 'portfolio restructuring agreement' means the agreement entered into between the Secretary and a participating administrative entity, as provided under section 513 [section 513 of Pub.L. 105-65, set out in this note].

(10) Participating administrative entity.—The term 'participating administrative entity' means a public agency (including a State housing finance agency or a local housing agency), a nonprofit organization, or any other entity (including a law firm or an accounting firm) or a combination of such entities, that meets the requirements under section 513(b) [section 513(b) of Pub.L. 105-65, set out in this note].

(11) Project-based assistance.—The term 'project-based assistance' means rental assistance described in paragraph (2)(B) of this section that is attached to a multifamily housing project.

(12) Renewal.—The term 'renewal' means the replacement of an expiring Federal rental contract with a new contract under section 8 of the United States Housing Act of 1937 [this section], consistent with the requirements of this

(13) Secretary.—The term 'Secretary' means the Secretary of Housing and Urban Development.

(14) State.—The term 'State' has the same meaning as in section 104 of the Cranston-Gonzalez National Affordable Housing Act [section 12704 of this title].

(15) Tenant-based assistance.—The term 'tenant-based assistance' has the same meaning as in section 8(f) of the United States Housing Act of 1937 [subsec. (f) of this section].

(16) Unit of general local government.—The term 'unit of general local government' has the same meaning as in section 104 of the Cranston-Gonzalez National Affordable Housing Act [section 12704 of this title].

(17) Very low-income family.—The term 'very low-income family' has the same meaning as in section 3(b) of the United States Housing Act of 1937 [section 1437a(b) of this title].

(18) Qualified mortgagee.—The term 'qualified mortgagee' means an entity approved by the Secretary that is capable of servicing, as well as originating, FHA-insured mortgages, and that—

(A) is not suspended or debarred by the Secretary;

(B) is not suspended or on probation imposed by the Mortgagee Review Board; and

(C) is not in default under any Government National Mortgage Association obligation.

(19) Office.—The term 'Office' means the Office of Multifamily Housing Assistance Restructuring established under section 571 [of this note]..

Sec. 513. Authority of participating administrative entities.

(a) Participating administrative entities.—

(1) In general.—Subject to subsection (b)(3), the Secretary shall enter into portfolio restructuring agreements with participating administrative entities for the implementation of mortgage restructuring and rental assistance sufficiency plans to restructure multifamily housing mortgages insured or held by the Secretary under the National Housing Act [Act June 27, 1934, c. 847, 48 Stat. 1246; see tables for classification], in order to—

(A) reduce the costs of expiring contracts for assistance under section 8 of the United States Housing Act of 1937 [this section];

(B) address financially and physically troubled projects; and

(C) correct management and ownership deficiencies.

(2) Portfolio restructuring agreements. — Each portfolio restructuring agreement entered into under this subsection shall—

(A) be a cooperative agreement to establish the obligations and requirements between the Secretary and the participating administrative entity;

(B) identify the eligible multifamily housing projects or groups of projects for which the participating administrative entity is responsible for assisting in developing and implementing approved mortgage restructuring and rental assistance sufficiency plans under section 514 [section 514 of Pub.L. 105-65, set out in this note];

(C) require the participating administrative entity to review and certify to the accuracy and completeness of the evaluation of rehabilitation needs required under section 514(e)(3) [section 514(e)(3) of Pub.L. 105-65, set out in this note] for each eligible multifamily housing project included in the portfolio restructuring agreement, in accordance with regulations promulgated by the Secretary;

(D) identify the responsibilities of both the participating administrative entity and the Secretary in implementing a mortgage restructuring and rental assistance sufficiency plan, including any actions proposed to be taken under section 516 or 517 [section 516 or 517 of Pub.L. 105-65, set out in this note];

(E) require each mortgage restructuring and rental assistance sufficiency plan to be prepared in accordance with the requirements of section 514 [section 514 of Pub.L. 105-65, set out in this note] for each eligible multifamily housing project;

(F) include other requirements established by the Secretary, including a right of the Secretary to terminate the contract immediately for failure of the participating administrative entity to comply with any applicable requirement;

(G) if the participating administrative entity is a State housing finance agency or a local housing agency, indemnify the participating administrative entity against lawsuits and penalties for actions taken pursuant to the agreement, excluding actions involving willful misconduct or negligence;

(H) include compensation for all reasonable expenses incurred by the participating administrative entity necessary to perform its duties under this subtitle; and

(I) include, where appropriate, incentive agreements with the participating administrative entity to reward superior performance in meeting the purposes of this title [this note] [the Multifamily Assisted Housing Reform and Affordability Act of 1997, Pub.L. 105-65, Title V, Oct. 27, 1997, 111 Stat. 1385; see Tables for classification].

(b) Selection of participating administrative entity.—

(1) Selection criteria.—The Secretary shall select a participating administrative entity based on whether, in the determination of the Secretary, the participating administrative entity—

(A) has demonstrated experience in working directly with residents of low-income housing projects and with tenants and other community-based organizations;

(B) has demonstrated experience with and capacity for multifamily restructuring and multifamily financing (which may include risk-sharing arrangements and restructuring eligible multifamily housing properties under the fiscal year 1997 Federal Housing Administration multifamily housing demonstration program);

(C) has a history of stable, financially sound, and responsible administrative performance (which may include the management of affordable low-income rental housing);

(D) has demonstrated financial strength in terms of asset quality, capital adequacy, and liquidity;

(E) has demonstrated that it will carry out the specific transactions and other responsibilities under this subtitle in a timely, efficient, and cost-effective manner; and

(F) meets other criteria, as determined by the Secretary.

(2) Selection.—If more than 1 interested entity meets the qualifications and selection criteria for a participating administrative entity, the Secretary may select the entity that demonstrates, as determined by the Secretary, that it will—

(A) provide the most timely, efficient, and cost-effective—

(i) restructuring of the mortgages covered by the portfolio restructuring agreement; and

(ii) administration of the section 8 project-based assistance contract, if applicable; and

(B) protect the public interest (including the long-term provision of decent low-income affordable rental housing and protection of residents, communities, and the American taxpayer).

(3) Partnerships.—For the purposes of any participating administrative entity applying under this subsection, participating administrative entities are encouraged to develop partnerships with each other and with nonprofit organizations, if such partnerships will further the participating administrative entity's ability to meet the purposes of this title [this note] [the Multifamily Assisted Housing Reform and Affordability Act of 1997, Pub.L. 105-65, Title V, Oct. 27, 1997, 111 Stat. 1385; see Tables for classification].

(4) Alternative administrators.—With respect to any eligible multifamily housing project for which a participating administrative entity is unavailable, or should not be selected to carry out the requirements of this subtitle with respect to that multifamily housing project for reasons relating to the selection criteria under paragraph (1), the Secretary shall—

(A) carry out the requirements of this subtitle with respect to that eligible multifamily housing project; or

(B) contract with other qualified entities that meet the requirements of paragraph (1) to provide the authority to carry out all or a portion of the requirements of this subtitle with respect to that eligible multifamily housing project.

(5) Priority for public agencies as participating administrative entities.—The Secretary shall provide a reasonable period during which the Secretary will consider proposals only from State housing finance agencies or local housing agencies, and the Secretary shall select such an agency without considering other applicants if the Secretary determines that the agency is qualified. The period shall be of sufficient duration for the Secretary to determine whether any State housing finance agencies or local housing agencies are interested and qualified. Not later than the end of the period, the Secretary shall notify the State housing finance agency or the local housing agency regarding the status of the proposal and, if the proposal is rejected, the reasons for the rejection and an opportunity for the applicant to respond.

(6) State and local portfolio requirements.—

(A) In general.—If the housing finance agency of a State is selected as the participating administrative entity, that agency shall be responsible for such eligible multifamily housing

projects in that State as may be agreed upon by the participating administrative entity and the Secretary. If a local housing agency is selected as the participating administrative entity, that agency shall be responsible for such eligible multifamily housing projects in the jurisdiction of the agency as may be agreed upon by the participating administrative entity and the Secretary.

(B) Nondelegation.—Except with the prior approval of the Secretary, a participating administrative entity may not delegate or transfer responsibilities and functions under this subtitle to 1 or more entities.

(7) Private entity requirements.—

(A) In general.—If a for-profit entity is selected as the participating administrative entity, that entity shall be required to enter into a partnership with a public purpose entity (including the Department).

(B) Prohibition.—No private entity shall share, participate in, or otherwise benefit from any equity created, received, or restructured as a result of the portfolio restructuring agreement.

Sec. 514. Mortgage restructuring and rental assistance sufficiency plan.

(a) In general.—

(1) Development of procedures and requirements.—The Secretary shall develop procedures and requirements for the submission of a mortgage restructuring and rental assistance sufficiency plan for each eligible multifamily housing project with an expiring contract.

(2) Terms and conditions.—Each mortgage restructuring and rental assistance sufficiency plan submitted under this subsection shall be developed by the participating administrative entity, in cooperation with an owner of an eligible multi-family housing project and any servicer for the mortgage that is a qualified mortgagee, under such terms and conditions as the Secretary shall require.

(3) Consolidation.—Mortgage restructuring and rental assistance sufficiency plans submitted under this subsection may be consolidated as part of an overall strategy for more than 1 property.

(b) Notice requirements.—The Secretary shall establish notice procedures and hearing requirements for tenants and owners concerning the dates for the expiration of project-based assistance contracts for any eligible multifamily housing project.

(c) Extension of contract term. —Subject to agreement by a project owner, the Secretary may extend the term of any expiring contract or provide a section 8 contract with rent levels set in accordance with subsection (g) for a period sufficient to facilitate the implementation of a mortgage restructuring and

rental assistance sufficiency plan, as determined by the Secretary.

(d) Tenant rent protection.—If the owner of a project with an expiring Federal rental assistance contract does not agree to extend the contract, not less than 12 months prior to terminating the contract, the project owner shall provide written notice to the Secretary and the tenants and the Secretary shall make tenant-based assistance available to tenants residing in units assisted under the expiring contract at the time of expiration. In addition, if after giving the notice required in the first sentence, an owner determines to terminate a contract, an owner shall provide an additional written notice with respect to the termination, in a form prescribed by the Secretary, not less than 120 days prior to the termination. In the event the owner does not provide the 120-day notice required in the preceding sentence, the owner may not evict the tenants or increase the tenants' rent payment until such time as the owner has provided the 120-day notice and such period has elapsed. The Secretary may allow the owner to renew the terminating contract for a period of time sufficient to give tenants 120 days of advance notice in accordance with section 524 of this Act [42 U.S.C.A. § 1437f note].

(e) Mortgage restructuring and rental assistance sufficiency plan. —Each mortgage restructuring and rental assistance sufficiency plan shall—

(1) except as otherwise provided, restructure the project-based assistance rents for the eligible multifamily housing project in a manner consistent with subsection (g), or provide for tenant-based assistance in accordance with section 515 [section 515 of Pub.L. 105-65, set out in this note];

(2) allow for rent adjustments by applying an operating cost adjustment factor established under guidelines established by the Secretary;

(3) require the owner or purchaser of an eligible multifamily housing project to evaluate the rehabilitation needs of the project, in accordance with regulations of the Secretary, and notify the participating administrative entity of the rehabilitation needs;

(4) require the owner or purchaser of the project to provide or contract for competent management of the project;

(5) require the owner or purchaser of the project to take such actions as may be necessary to rehabilitate, maintain adequate reserves, and to maintain the project in decent and safe condition, based on housing quality standards established by-

(A) the Secretary; or

(B) local housing codes or codes adopted by public housing agencies that—

(i) meet or exceed housing quality standards established by the Secretary; and

(ii) do not severely restrict housing choice;

(6) require the owner or purchaser of the project to maintain affordability and use restrictions in accordance with regulations promulgated by the Secretary, for a term of not less than 30 years which restrictions shall be—

(A) contained in a legally enforceable document recorded in the appropriate records; and

(B) consistent with the long-term physical and financial viability and character of the project as affordable housing;

(7) include a certification by the participating administrative entity that the restructuring meets subsidy layering requirements established by the Secretary by regulation for purposes of this subtitle;

(8) require the owner or purchaser of the project to meet such other requirements as the Secretary determines to be appropriate; and

(9) prohibit the owner from refusing to lease a reasonable number of units to holders of certificates and vouchers under section 8 of the United States Housing Act of 1937 [this section] because of the status of the prospective tenants as certificate and voucher holders.

(f) Tenant and other participation and capacity building.—

(1) Procedures.—

(A) In general.—The Secretary shall establish procedures to provide an opportunity for tenants of the project, residents of the neighborhood, the local government, and other affected parties to participate effectively and on a timely basis in the restructuring process established by this subtitle.

(B) Coverage.—These procedures shall take into account the need to provide tenants of the project, residents of the neighborhood, the local government, and other affected parties timely notice of proposed restructuring actions and appropriate access to relevant information about restructuring activities. To the extent practicable and consistent with the need to accomplish project restructuring in an efficient manner, the procedures shall give all such parties an opportunity to provide comments to the participating administrative entity in writing, in meetings, or in another appropriate manner (which comments shall be taken into consideration by the participating administrative entity).

(2) Required consultation.—The procedures developed pursuant to paragraph (1) shall require consultation with tenants of the project, residents of the neighborhood, the local government, and

other affected parties, in connection with at least the following:

(A) the mortgage restructuring and rental assistance sufficiency plan;

(B) any proposed transfer of the project; and

(C) the rental assistance assessment plan pursuant to section 515(c) [section 515(c) of Pub.L. 105-65, set out in this note].

(3) Funding.—

(A) In general.—The Secretary shall make available not more than $10,000,000 annually in funding, which amount shall be in addition to any amounts made available under this subparagraph and carried over from previous years, from which the Secretary may make obligations to tenant groups, nonprofit organizations, and public entities for building the capacity of tenant organizations, for technical assistance in furthering any of the purposes of this subtitle (including transfer of developments to new owners), for technical assistance for preservation of low-income housing for which project-based rental assistance is provided at below market rent levels and may not be renewed (including transfer of developments to tenant groups, nonprofit organizations, and public entities), for tenant services, and for tenant groups, nonprofit organizations, and public entities described in section 517(a)(5), from those amounts made available under appropriations

Acts for implementing this subtitle or previously made available for technical assistance in connection with the preservation of affordable rental housing for low-income persons.

(B) Manner of providing.—Notwithstanding any other provision of law restricting the use of preservation technical assistance funds, the Secretary may provide any funds made available under subparagraph (A) through existing technical assistance programs pursuant to any other Federal law, including the Low-Income Housing Preservation and Resident Homeownership Act of 1990 [Pub.L. 100-242, Title II, Feb. 5, 1988, 101 Stat. 1877] and the Multifamily Housing Property Disposition Reform Act of 1994 [sic; probably should read 'Multifamily Housing Property Disposition Reform Act of 1994' (Pub.L. 103-233, Apr. 11, 1994, 108 Stat. 342)], or through any other means that the Secretary considers consistent with the purposes of this subtitle, without regard to any set-aside requirement otherwise applicable to those funds.

(C) Prohibition.—None of the funds made available under subparagraph (A) may be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the

introduction of any bill or resolution proposing such legislation or appropriation.

(g) Rent levels.—

(1) In general.—Except as provided in paragraph (2), each mortgage restructuring and rental assistance sufficiency plan pursuant to the terms, conditions, and requirements of this subtitle shall establish for units assisted with project-based assistance in eligible multifamily housing projects adjusted rent levels that—

(A) are equivalent to rents derived from comparable properties, if—

(i) the participating administrative entity makes the rent determination within a reasonable period of time; and

(ii) the market rent determination is based on not less than 2 comparable properties; or

(B) if those rents cannot be determined, are equal to 90 percent of the fair market rents for the relevant market area.

(2) Exceptions.—

(A) In general.—A contract under this section may include rent levels that exceed the rent level described in paragraph (1) at rent levels that do not exceed 120 percent of the fair market rent for the market area (except that the Secretary may waive this limit for not more than five percent of

all units subject to portfolio restructuring agreements, based on a finding of special need), if the participating administrative entity—

(i) determines that the housing needs of the tenants and the community cannot be adequately addressed through implementation of the rent limitation required to be established through a mortgage restructuring and rental assistance sufficiency plan under paragraph (1); and

(ii) follows the procedures under paragraph (3).

(B) Exception rents.—In any fiscal year, a participating administrative entity may approve exception rents on not more than 20 percent of all units covered by the portfolio restructuring agreement with expiring contracts in that fiscal year, except that the Secretary may waive this ceiling upon a finding of special need.

(3) Rent levels for exception projects.—For purposes of this section, a project eligible for an exception rent shall receive a rent calculated on the actual and projected costs of operating the project, at a level that provides income sufficient to support a budget-based rent that consists of—

(A) the debt service of the project;

(B) the operating expenses of the project, as determined by the participating administrative entity, including—

(i) contributions to adequate reserves;

(ii) the costs of maintenance and necessary rehabilitation; and

(iii) other eligible costs permitted under section 8 of the United States Housing Act of 1937 [this section];

(C) an adequate allowance for potential operating losses due to vacancies and failure to collect rents, as determined by the participating administrative entity;

(D) an allowance for a reasonable rate of return to the owner or purchaser of the project, as determined by the participating administrative entity, which may be established to provide incentives for owners or purchasers to meet benchmarks of quality for management and housing quality; and

(E) other expenses determined by the participating administrative entity to be necessary for the operation of the project.

(h) Exemptions from restructuring.—The following categories of projects shall not be covered by a mortgage restructuring and rental assistance sufficiency plan if—

(1) the primary financing or mortgage insurance for the multifamily housing project that is covered by that expiring contract was provided by a unit of State government or a unit of general local government (or an agency or instrumentality of a unit of a State government or unit of general local

government) and the financing involves mortgage insurance under the National Housing Act [12 U.S.C.A. § 1701 et seq.], such that the implementation of a mortgage restructuring and rental assistance sufficiency plan under this subtitle is in conflict with applicable law or agreements governing such financing;

(2) the project is a project financed under section 202 of the Housing Act of 1959 [section 1701q of Title 12] or section 515 of the Housing Act of 1949 [section 1485 of this title], or refinanced pursuant to section 811 of the American Homeownership and Economic Opportunity Act of 2000 (12 U.S.C. 1701q note); or

(3) the project has an expiring contract under section 8 of the United States Housing Act of 1937 [this section] entered into pursuant to section 441 of the McKinney-Vento Homeless Assistance Act [section 11401 of this title].

Sec. 515. Section 8 renewals and long-term affordability commitment by owner of project.

(a) Section 8 renewals of restructured projects.—

(1) Project-based assistance.—Subject to the availability of amounts provided in advance in appropriations Acts, and to the control of the Secretary of applicable accounts in the Treasury of the United States, with respect to an expiring section 8 contract on an eligible multifamily housing project to be renewed with project-based

assistance (based on a determination under subsection (c)), the Secretary shall enter into contracts with participating administrative entities pursuant to which the participating administrative entity shall offer to renew or extend the contract, or the Secretary shall offer to renew such contract, and the owner of the project shall accept the offer, if the initial renewal is in accordance with the terms and conditions specified in the mortgage restructuring and rental assistance sufficiency plan and the rental assistance assessment plan.

(2) Tenant-based assistance.—Subject to the availability of amounts provided in advance in appropriations Acts and to the control of the Secretary of applicable accounts in the Treasury of the United States, with respect to an expiring section 8 contract on an eligible multifamily housing project to be renewed with tenant-based assistance (based on a determination under subsection (c)), the Secretary shall enter into contracts with participating administrative entities pursuant to which the participating administrative entity shall provide for the renewal of section 8 assistance on an eligible multifamily housing project with tenant-based assistance, or the Secretary shall provide for such renewal, in accordance with the terms and conditions specified in the mortgage restructuring and rental assistance sufficiency plan and the rental assistance assessment plan.

(b) Required commitment.—After the initial renewal of a section 8 contract pursuant to this section, the owner shall accept each offer made

pursuant to subsection (a) to renew the contract, for the term of the affordability and use restrictions required by section 514(e)(6) [section 514(e)(6) of Pub.L. 105-65, set out in this note], if the offer to renew is on terms and conditions specified in the mortgage restructuring and rental assistance sufficiency plan.

(c) Determination of whether to renew with project-based or tenant-based assistance.—

(1) Mandatory renewal of project-based assistance.—Section 8 assistance shall be renewed with project-based assistance, if—

(A) the project is located in an area in which the participating administrative entity determines, based on housing market indicators, such as low vacancy rates or high absorption rates, that there is not adequate available and affordable housing or that the tenants of the project would not be able to locate suitable units or use the tenant-based assistance successfully;

(B) a predominant number of the units in the project are occupied by elderly families, disabled families, or elderly and disabled families; or

(C) the project is held by a nonprofit cooperative ownership housing corporation or nonprofit cooperative housing trust.

(2) Rental assistance assessment plan.—

(A) In general.—With respect to any project that is not described in paragraph (1), the participating administrative entity shall, after consultation with the owner of the project, develop a rental assistance assessment plan to determine whether to renew assistance for the project with tenant-based assistance or project-based assistance.

(B) Rental assistance assessment plan requirements.—Each rental assistance assessment plan developed under this paragraph shall include an assessment of the impact of converting to tenant-based assistance and the impact of extending project-based assistance on—

(i) the ability of the tenants to find adequate, available, decent, comparable, and affordable housing in the local market;

(ii) the types of tenants residing in the project (such as elderly families, disabled families, large families, and cooperative homeowners);

(iii) the local housing needs identified in the comprehensive housing affordability strategy, and local market vacancy trends;

(iv) the cost of providing assistance, comparing the applicable payment standard to the project's adjusted rent levels determined under section 514(g) [section 514(g) of Pub.L. 105-65, set out in this note];

(v) the long-term financial stability of the project;

(vi) the ability of residents to make reasonable choices about their individual living situations;

(vii) the quality of the neighborhood in which the tenants would reside; and

(viii) the project's ability to compete in the market-place.

(C) Reports to director.—Each participating administrative entity shall report regularly to the Director as defined in subtitle D [sections 571-579 of Pub.L. 105-65, set out in this note], as the Director shall require, identifying—

(i) each eligible multifamily housing project for which the entity has developed a rental assistance assessment plan under this paragraph that determined that the tenants of the project generally supported renewal of assistance with tenant-based assistance, but under which assistance for the project was renewed with project-based assistance; and

(ii) each project for which the entity has developed such a plan under which the assistance is renewed using tenant-based assistance.

(3) Eligibility for tenant-based assistance.—Subject to paragraph (4), with respect to any project that is not described in paragraph (1), if a participating administrative entity approves the use of tenant-based assistance based on a rental

assistance assessment plan developed under paragraph (2), tenant-based assistance shall be provided to each assisted family (other than a family already receiving tenant-based assistance) residing in the project at the time the assistance described in section 512(2)(B) [section 512(2)(B) of Pub.L. 105-65, set out in this note] terminates.

(4) Assistance through enhanced vouchers.—In the case of any family described in paragraph (3) that resides in a project described in section 512(2)(B) [of this note], the tenant-based assistance provided shall be enhanced voucher assistance under section 8(t) of the United States Housing Act of 1937 (42 U.S.C. 1437f(t)).

(5) Inapplicability of certain provision.—If a participating administrative entity approves renewal with project-based assistance under this subsection, section 8(d)(2) of the United States Housing Act of 1937 [subsec. (d)(2) of this section] shall not apply.

Sec. 516. Prohibition on restructuring.

(a) Prohibition on restructuring.—The Secretary may elect not to consider any mortgage restructuring and rental assistance sufficiency plan or request for contract renewal if the Secretary or the participating administrative entity determines that—

(1)(A) the owner or purchaser of the project has engaged in material adverse financial or managerial actions or omissions with regard to such project; or

(B) the owner or purchaser of the project has engaged in material adverse financial or managerial actions or omissions with regard to other projects of such owner or purchaser that are federally assisted or financed with a loan from, or mortgage insured or guaranteed by, an agency of the Federal Government;

(2) material adverse financial or managerial actions or omissions include—

(A) materially violating any Federal, State, or local law or regulation with regard to this project or any other federally assisted project, after receipt of notice and an opportunity to cure;

(B) materially breaching a contract for assistance under section 8 of the United States Housing Act of 1937 [this section], after receipt of notice and an opportunity to cure;

(C) materially violating any applicable regulatory or other agreement with the Secretary or a participating administrative entity, after receipt of notice and an opportunity to cure;

(D) repeatedly and materially violating any Federal, State, or local law or regulation with regard to the project or any other federally assisted project;

(E) repeatedly and materially breaching a contract for assistance under section 8 of the United States Housing Act of 1937 [this section];

(F) repeatedly and materially violating any applicable regulatory or other agreement with the Secretary or a participating administrative entity;

(G) repeatedly failing to make mortgage payments at times when project income was sufficient to maintain and operate the property;

(H) materially failing to maintain the property according to housing quality standards after receipt of notice and a reasonable opportunity to cure; or

(I) committing any actions or omissions that would warrant suspension or debarment by the Secretary;

(3) the owner or purchaser of the property materially failed to follow the procedures and requirements of this subtitle, after receipt of notice and an opportunity to cure; or

(4) the poor condition of the project cannot be remedied in a cost effective manner, as determined by the participating administrative entity.

The term 'owner' as used in this subsection, in addition to it having the same meaning as in section 8(f) of the United States Housing Act of 1937 [subsec. (f) of this section], also means an affiliate of the owner. The term 'purchaser' as used in this subsection means any private person or entity, including a cooperative, an agency of the Federal Government, or a public housing agency, that, upon

purchase of the project, would have the legal right to lease or sublease dwelling units in the project, and also means an affiliate of the purchaser. The terms 'affiliate of the owner' and 'affiliate of the purchaser' means any person or entity (including, but not limited to, a general partner or managing member, or an officer of either) that controls an owner or purchaser, is controlled by an owner or purchaser, or is under common control with the owner or purchaser. The term 'control' means the direct or indirect power (under contract, equity ownership, the right to vote or determine a vote, or otherwise) to direct the financial, legal, beneficial or other interests of the owner or purchaser.

(b) Opportunity to dispute findings.—

(1) In general.—During the 30-day period beginning on the date on which the owner or purchaser of an eligible multifamily housing project receives notice of a rejection under subsection (a) or of a mortgage restructuring and rental assistance sufficiency plan under section 514 [section 514 of Pub.L. 105-65, set out in this note], the Secretary or participating administrative entity shall provide that owner or purchaser with an opportunity to dispute the basis for the rejection and an opportunity to cure.

(2) Affirmation, modification, or reversal.—

(A) In general.—After providing an opportunity to dispute under paragraph (1), the Secretary or the participating administrative entity may affirm, modify, or reverse any rejection under

subsection (a) or rejection of a mortgage restructuring and rental assistance sufficiency plan under section 514 [section 514 of Pub.L. 105-65, set out in this note].

(B) Reasons for decision.—The Secretary or the participating administrative entity, as applicable, shall identify the reasons for any final decision under this paragraph.

(C) Review process.—The Secretary shall establish an administrative review process to appeal any final decision under this paragraph.

(c) Final determination.—Any final determination under this section shall not be subject to judicial review.

(d) Displaced tenants.—

(1) Notice to certain residents.—The Office shall notify any tenant that is residing in a project or receiving assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) at the time of rejection under this section, of such rejection, except that the Office may delegate the responsibility to provide notice under this paragraph to the participating administrative entity.

(2) Assistance and moving expenses.—Subject to the availability of amounts provided in advance in appropriations Acts, for any low-income tenant that is residing in a project or receiving assistance under section 8 of the United States Housing Act of

1937 [this section] at the time of rejection under this section, that tenant shall be provided with tenant-based assistance and reasonable moving expenses, as determined by the Secretary.

(e) Transfer of property.—For properties disqualified from the consideration of a mortgage restructuring and rental assistance sufficiency plan under this section in accordance with paragraph (1) or (2) of subsection (a) because of actions by an owner or purchaser, the Secretary shall establish procedures to facilitate the voluntary sale or transfer of a property as part of a mortgage restructuring and rental assistance sufficiency plan, with a preference for tenant organizations and tenant-endorsed community-based nonprofit and public agency purchasers meeting such reasonable qualifications as may be established by the Secretary.

Sec. 517. Restructuring tools.

(a) Mortgage restructuring.—

(1) In this subtitle, an approved mortgage restructuring and rental assistance sufficiency plan shall include restructuring mortgages in accordance with this subsection to provide—

(A) a restructured or new first mortgage that is sustainable at rents at levels that are established in section 514(g) [section 514(g) of Pub.L. 105-65, set out in this note]; and

(B) a second mortgage that is in an amount equal to not more than the greater of—

(i) the full or partial payment of claim made under this subtitle [§§ 511 to 524 of this note]; or

(ii) the difference between the restructured or new first mortgage and the indebtedness under the existing insured mortgage immediately before it is restructured or refinanced, provided that the amount of the second mortgage shall be in an amount that the Secretary or participating administrative entity determines can reasonably be expected to be repaid.

(2) The second mortgage shall bear interest at a rate not to exceed the applicable Federal rate as defined in section 1274(d) of the Internal Revenue Code of 1986 [section 1274(d) of Title 26]. The term of the second mortgage shall be equal to the term of the restructured or new first mortgage.

(3) Payments on the second mortgage shall be deferred when the first mortgage remains outstanding, except to the extent there is excess project income remaining after payment of all reasonable and necessary operating expenses (including deposits in a reserve for replacement), debt service on the first mortgage, and any other expenditures approved by the Secretary. At least 75 percent of any excess project income shall be applied to payments on the second mortgage, and the Secretary or the participating administrative entity may permit up to 25 percent to be paid to the project owner if the Secretary or participating administrative entity determines that the project owner meets benchmarks for management and housing quality.

(4) The full amount of the second mortgage shall be immediately due and payable if—

(A) the first mortgage is terminated or paid in full, except as otherwise provided by the holder of the second mortgage;

(B) the project is purchased and the second mortgage is assumed by any subsequent purchaser in violation of guidelines established by the Secretary; or

(C) the Secretary provides notice to the project owner that such owner has failed to materially comply with any requirements of this section or the United States Housing Act of 1937 [Act Sept. 1, 1937, c. 896, 50 Stat. 888] as those requirements apply to the project, with a reasonable opportunity for such owner to cure such failure.

(5) The Secretary may modify the terms of the second mortgage, assign the second mortgage to the acquiring organization or agency, or forgive all or part of the second mortgage if the Secretary holds the second mortgage and if the project is acquired by a tenant organization or tenant-endorsed community-based nonprofit or public agency, pursuant to guidelines established by the Secretary.

(6) The second mortgage under this section may be a first mortgage if no restructured or new first mortgage will meet the requirement of paragraph (1)(A).

(b) Restructuring tools.—In addition to the requirements of subsection (a) and to the extent these actions are consistent with this section and with the control of the Secretary of applicable accounts in the Treasury of the United States, an approved mortgage restructuring and rental assistance sufficiency plan under this subtitle may include one or more of the following actions:

(1) Full or partial payment of claim.—Making a full payment of claim or partial payment of claim under section 541(b) of the National Housing Act [section 1735f-19(b) of Title 12], as amended by section 523(b) of this Act [section 523(b) of Pub.L. 105-65, set out in this note]. Any payment under this paragraph shall not require the approval of a mortgagee.

(2) Refinancing of debt.—Refinancing of all or part of the debt on a project. If the refinancing involves a mortgage that will continue to be insured under the National Housing Act, the refinancing shall be documented through amendment of the existing insurance contract and not through a new insurance contract.

(3) Mortgage insurance.—Providing FHA multifamily mortgage insurance, reinsurance or other credit enhancement alternatives, including multifamily risk-sharing mortgage programs, as provided under section 542 of the Housing and Community Development Act of 1992 [12 U.S.C.A. § 1707 note]. The Secretary shall use risk-shared financing under section 542(c) of the Housing and Community Development Act of 1992 for any

mortgage restructuring, rehabilitation financing, or debt refinancing included as part of a mortgage restructuring and rental assistance sufficiency plan if the terms and conditions are considered to be the best available financing in terms of financial savings to the FHA insurance funds and will result in reduced risk of loss to the Federal Government. Any limitations on the number of units available for mortgage insurance under section 542 shall not apply to eligible multifamily housing projects. Any credit subsidy costs of providing mortgage insurance shall be paid from the Liquidating Accounts of the General Insurance Fund or the Special Risk Insurance Fund and shall not be subject to any limitation on appropriations.

(4) Credit enhancement.—Providing any additional State or local mortgage credit enhancements and risk-sharing arrangements that may be established with State or local housing finance agencies, the Federal Housing Finance Agency, the Federal National Mortgage Association, and the Federal Home Loan Mortgage Corporation, to a modified or refinanced first mortgage.

(5) Compensation of third parties.—Consistent with the portfolio restructuring agreement, entering into agreements, incurring costs, or making payments, including incentive agreements designed to reward superior performance in meeting the purposes of this Act, as may be reasonably necessary, to compensate the participation of participating administrative entities and other parties in undertaking actions

authorized by this subtitle. Upon request to the Secretary, participating administrative entities that are qualified under the United States Housing Act of 1937 [Act Sept. 1, 1937, c. 896, 50 Stat. 888] to serve as contract administrators shall be the contract administrators under section 8 of the United States Housing Act of 1937 [this section] for purposes of any contracts entered into as part of an approved mortgage restructuring and rental assistance sufficiency plan. Subject to the availability of amounts provided in advance in appropriations Acts for administrative fees under section 8 of the United States Housing Act of 1937 [this section], such amounts may be used to compensate participating administrative entities for compliance monitoring costs incurred under section 519 [section 519 of Pub.L. 105-65, set out in this note].

(6) Use of project accounts.—Applying any residual receipts, replacement reserves, and any other project accounts not required for project operations, to maintain the long-term affordability and physical condition of the property or of other eligible multifamily housing projects. The participating administrative entity may expedite the acquisition of residual receipts, replacement reserves, or other such accounts, by entering into agreements with owners of housing covered by an expiring contract to provide an owner with a share of the receipts, not to exceed 10 percent, in accordance with guidelines established by the Secretary.

(c) Rehabilitation needs and addition of significant features.—

(1) Rehabilitation needs.—

(A) In general.—Rehabilitation may be paid from the residual receipts, replacement reserves, or any other project accounts not required for project operations, or, as provided in appropriations Acts and subject to the control of the Secretary of applicable accounts in the Treasury of the United States, from budget authority provided for increases in the budget authority for assistance contracts under section 8 of the United States Housing Act of 1937 [this section], the rehabilitation grant program established under section 236 of the National Housing Act [section 1715z-1 of Title 12], as amended by section 531 of subtitle B of this Act [section 531 of Pub.L. 105-65, amending section 1715z-1(s) of Title 12], or through the debt restructuring transaction. Rehabilitation under this paragraph shall only be for the purpose of restoring the project to a non-luxury standard adequate for the rental market intended at the original approval of the project-based assistance.

(B) Contribution.—Each owner or purchaser of a project to be rehabilitated under an approved mortgage restructuring and rental assistance sufficiency plan shall contribute, from non-project resources, not less than 25 percent of the amount of rehabilitation assistance received, except that the participating administrative entity may

provide an exception from the requirement of this subparagraph for housing cooperatives.

(2) Addition of significant features.—

(A) Authority.—An approved mortgage restructuring and rental assistance sufficiency plan may require the improvement of the project by the addition of significant features that are not necessary for rehabilitation to the standard provided under paragraph (1), such as air conditioning, an elevator, and additional community space. The Secretary shall establish guidelines regarding the inclusion of requirements regarding such additional significant features under such plans.

(B) Funding.—Significant features added pursuant to an approved mortgage restructuring and rental assistance sufficiency plan may be paid from the funding sources specified in the first sentence of paragraph (1)(A).

(C) Limitation on owner contribution.—An owner of a project may not be required to contribute from non-project resources, toward the cost of any additional significant features required pursuant to this paragraph, more than 25 percent of the amount of any assistance received for the inclusion of such features.

(D) Applicability.—This paragraph shall apply to all eligible multifamily housing projects, except projects for which the Secretary and the project owner executed a mortgage restructuring and

rental assistance sufficiency plan on or before the date of the enactment of the Mark-to-Market Extension Act of 2001 [Jan. 10, 2002].

(d) Prohibition on equity sharing by the Secretary.—The Secretary is prohibited from participating in any equity agreement or profit-sharing agreement in conjunction with any eligible multifamily housing project.

(e) Conflict of interest guidelines.—The Secretary may establish guidelines to prevent conflicts of interest by a participating administrative entity that provides, directly or through risk-sharing arrangements, any form of credit enhancement or financing pursuant to subsections (b)(3) or (b)(4) [of this note] or to prevent conflicts of interest by any other person or entity under this subtitle.

Sec. 518. Management standards.

Each participating administrative entity shall establish management standards, including requirements governing conflicts of interest between owners, managers, contractors with an identity of interest, pursuant to guidelines established by the Secretary and consistent with industry standards.

Sec. 519. Monitoring of compliance.

(a) Compliance agreements.—(1) Pursuant to regulations issued by the Secretary under section 522(a) [section 522(a) of Pub.L. 105-65, set out in this note], each participating administrative entity, through binding contractual agreements with

owners and otherwise, shall ensure long-term compliance with the provisions of this subtitle. Each agreement shall, at a minimum, provide for—

(A) enforcement of the provisions of this subtitle; and

(B) remedies for the breach of those provisions.

(2) If the participating administrative entity is not qualified under the United States Housing Act of 1937 [Act Sept. 1, 1937, c. 896, 50 Stat. 888] to be a section 8 contract administrator or fails to perform its duties under the portfolio restructuring agreement, the Secretary shall have the right to enforce the agreement.

(b) Periodic monitoring.—

(1) In general.—Not less than annually, each participating administrative entity that is qualified to be the section 8 contract administrator shall review the status of all multifamily housing projects for which a mortgage restructuring and rental assistance sufficiency plan has been implemented.

(2) Inspections.—Each review under this subsection shall include onsite inspection to determine compliance with housing codes and other requirements as provided in this subtitle and the portfolio restructuring agreements.

(3) Administration.—If the participating administrative entity is not qualified under the United States Housing Act of 1937 [Act Sept. 1, 1937, c. 896, 50 Stat. 888] to be a section 8 contract administrator, either the Secretary or a qualified State or local housing agency shall be responsible for the review required by this subsection.

(c) Audit by the Secretary.—The Comptroller General of the United States, the Secretary, and the Inspector General of the Department of Housing and Urban Development may conduct an audit at any time of any multifamily housing project for which a mortgage restructuring and rental assistance sufficiency plan has been implemented.

Sec. 520. Reports to congress.

(a) Annual review.—In order to ensure compliance with this subtitle, the Secretary shall conduct an annual review and report to the Congress on actions taken under this subtitle and the status of eligible multifamily housing projects.

(b) Semiannual review.—Not less than semiannually during the 2-year period beginning on the date of the enactment of this Act [Oct. 27, 1997] and not less than annually thereafter, the Secretary shall submit reports to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate stating, for such periods, the total number of projects identified by participating administrative entities under each of clauses (i) and (ii) of section 515(c)(2)(C) [set out in this note].

Sec. 521. GAO audit and review.

(a) Initial audit.—Not later than 18 months after the effective date of final regulations promulgated under this subtitle, the Comptroller General of the United States shall conduct an audit to evaluate eligible multifamily housing projects and the implementation of mortgage restructuring and rental assistance sufficiency plans.

(b) Report.—

(1) In general.—Not later than 18 months after the audit conducted under subsection (a), the Comptroller General of the United States shall submit to Congress a report on the status of eligible multifamily housing projects and the implementation of mortgage restructuring and rental assistance sufficiency plans.

(2) Contents.—The report submitted under paragraph (1) shall include—

(A) a description of the initial audit conducted under subsection (a); and

(B) recommendations for any legislative action to increase the financial savings to the Federal Government of the restructuring of eligible multifamily housing projects balanced with the continued availability of the maximum number of affordable low-income housing units.

Sec. 522. Regulations.

(a) Rulemaking and implementation.—

(1) Interim regulations.—The Director shall issue such interim regulations as may be necessary to implement this subtitle and the amendments made by this subtitle with respect to eligible multifamily housing projects covered by contracts described in section 512(2)(B) [section 512(2)(B) of Pub.L. 105-65, set out in this note] that expire in fiscal year 1999 or thereafter. If, before the expiration of such period, the Director has not been appointed, the Secretary shall issue such interim regulations.

(2) Final regulations.—The Director shall issue final regulations necessary to implement this subtitle and the amendments made by this subtitle with respect to eligible multifamily housing projects covered by contracts described in section 512(2)(B) [section 512(2)(B) of Pub.L. 105-65, set out in this note] that expire in fiscal year 1999 or thereafter before the later of: (A) the expiration of the 12-month period beginning upon the date of the enactment of this Act; and (B) the 3-month period beginning upon the appointment of the Director under subtitle D [sections 571-579 of Pub.L. 105-65, set out in this note].

(3) Factors for consideration.—Before the publication of the final regulations under paragraph (2), in addition to public comments invited in connection with publication of the interim rule, the Secretary shall—

(A) seek recommendations on the implementation of sections 513(b) and 515(c)(1) [sections 513(b) and 515(c)(1) of Pub.L. 105-65, set out in this note] from organizations representing—

(i) State housing finance agencies and local housing agencies;

(ii) other potential participating administering entities;

(iii) tenants;

(iv) owners and managers of eligible multifamily housing projects;

(v) States and units of general local government; and

(vi) qualified mortgagees; and

(B) convene not less than 3 public forums at which the organizations making recommendations under subparagraph (A) may express views concerning the proposed disposition of the recommendations.

(b) Transition provision for contracts expiring in fiscal year 1998.—Notwithstanding any other provision of law, the Secretary shall apply all the terms of section 211 and section 212 of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997 [sections 211 and 212 of

Pub.L. 104-204, Sept. 26, 1996, 110 Stat. 2895, 2897, set out as a note under this section] (except for section 212(h)(1)(G) [section 212(h)(1)(G) of Pub.L. 104-204, Sept. 26, 1996, 110 Stat. 2900, set out as a note under this section] and the limitation in section 212(k) [section 212(k) of Pub.L. 104-204, Sept. 26, 1996, 110 Stat. 2902, set out as a note under this section]) contracts for project-based assistance that expire during fiscal year 1998 (in the same manner that such provisions apply to expiring contracts defined in section 212(a)(3) of such Act), except that section 517(a) of the Act [section 517(a) of Pub.L. 105-65, set out in this note] shall apply to mortgages on projects subject to such contracts.

Sec. 523. [Omitted.]

Sec. 524. Renewal of expiring project-based section 8 contracts

(a) In general.—

(1) Renewal.—Subject to paragraph (2), upon termination or expiration of a contract for project-based assistance under section 8 [this section] for a multifamily housing project (and notwithstanding section 8(v) of the United States Housing Act 1937 [subsec. (v) of this section] for loan management assistance), the Secretary shall, at the request of the owner of the project and to the extent sufficient amounts are made available in appropriation Acts, use amounts available for the renewal of assistance under section 8 of such Act [this section] to provide such assistance for the project. The assistance shall be provided under a contract having such terms

and conditions as the Secretary considers appropriate, subject to the requirements of this section. This section shall not require contract renewal for a project that is eligible under this subtitle for a mortgage restructuring and rental assistance sufficiency plan, if there is no approved plan for the project and the Secretary determines that such an approved plan is necessary.

(2) Prohibition on renewal.—Notwithstanding part 24 of title 24 of the Code of Federal Regulations, the Secretary may elect not to renew assistance for a project otherwise required to be renewed under paragraph (1) or provide comparable benefits under paragraph (1) or (2) of subsection (e) for a project described in either such paragraph, if the Secretary determines that a violation under paragraphs (1) through (4) of section 516(a) [of this note] has occurred with respect to the project. For purposes of such a determination, the provisions of section 516 [of this note] shall apply to a project under this section in the same manner and to the same extent that the provisions of such section apply to eligible multifamily housing projects, except that the Secretary shall make the determination under section 516(a)(4) [of this note].

(3) Contract term for mark-up-to-market contracts.—In the case of an expiring or terminating contract that has rent levels less than comparable market rents for the market area, if the rent levels under the renewal contract under this section are equal to comparable market rents for the market area, the contract shall have a term

of not less than 5 years, subject to the availability of sufficient amounts in appropriation Acts.

(4) Renewal rents.—Except as provided in subsection (b), the contract for assistance shall provide assistance at the following rent levels:

(A) Market rents.—At the request of the owner of the project, at rent levels equal to the lesser of comparable market rents for the market area or 150 percent of the fair market rents, in the case only of a project that—

(i) has rent levels under the expiring or terminating contract that do not exceed such comparable market rents;

(ii) does not have a low.—and moderate-income use restriction that can not be eliminated by unilateral action by the owner;

(iii) is decent, safe, and sanitary housing, as determined by the Secretary;

(iv) is not—

(I) owned by a nonprofit entity;

(II) subject to a contract for moderate rehabilitation assistance under section 8(e)(2) of the United States Housing Act of 1937 [subsec. (e)(2) of this section], as in effect before October 1, 1991; or

(III) a project for which the public housing agency provided voucher assistance to one or more of the tenants after the owner has provided notice of termination of the contract covering the tenant's unit; and

(v) has units assisted under the contract for which the comparable market rent exceeds 110 percent of the fair market rent.

The Secretary may adjust the percentages of fair market rent (as specified in the matter preceding clause (i) and in clause (v)), but only upon a determination and written notification to the Congress within 10 days of making such determination, that such adjustment is necessary to ensure that this subparagraph covers projects with a high risk of nonrenewal of expiring contracts for project-based assistance.

(B) Reduction to market rents.—In the case of a project that has rent levels under the expiring or terminating contract that exceed comparable market rents for the market area, at rent levels equal to such comparable market rents.

(C) Rents not exceeding market rents.—In the case of a project that is not subject to subparagraph (A) or (B), at rent levels that—

(i) are not less than the existing rents under the terminated or expiring contract, as adjusted by an operating cost adjustment factor established by the Secretary (which shall not result in a negative adjustment), if such adjusted rents do

not exceed comparable market rents for the market area; and

(ii) do not exceed comparable market rents for the market area.

In determining the rent level for a contract under this subparagraph, the Secretary shall approve rents sufficient to cover budget-based cost increases and shall give greater consideration to providing rent at a level up to comparable market rents for the market area based on the number of the criteria under clauses (i) through (iii) of subparagraph (D) that the project meets. Notwithstanding any other provision of law, the Secretary shall include in such budget-based cost increases costs relating to the project as a whole (including costs incurred with respect to units not covered by the contract for assistance), but only (I) if inclusion of such costs is requested by the owner or purchaser of the project, (II) if inclusion of such costs will permit capital repairs to the project or acquisition of the project by a nonprofit organization, and (III) to the extent that inclusion of such costs (or a portion thereof) complies with the requirement under clause (ii).

(D) Waiver of 150 percent limitation.—Notwithstanding subparagraph (A), at rent levels up to comparable market rents for the market area, in the case of a project that meets the requirements under clauses (i) through (v) of subparagraph (A) and—

(i) has residents who are a particularly vulnerable population, as demonstrated by a high percentage of units being rented to elderly families, disabled families, or large families;

(ii) is located in an area in which tenant-based assistance would be difficult to use, as demonstrated by a low vacancy rate for affordable housing, a high turnback rate for vouchers, or a lack of comparable rental housing; or

(iii) is a high priority for the local community, as demonstrated by a contribution of State or local funds to the property.

In determining the rent level for a contract under this subparagraph, the Secretary shall approve rents sufficient to cover budget-based cost increases and shall give greater consideration to providing rent at a level up to comparable market rents for the market area based on the number of the criteria under clauses (i) through (iv) that the project meets.

(5) Comparable market rents and comparison with fair market rents.—The Secretary shall prescribe the method for determining comparable market rent by comparison with rents charged for comparable properties (as such term is defined in section 512), which may include appropriate adjustments for utility allowances and adjustments to reflect the value of any subsidy (other than section 8 assistance) provided by the Department of Housing and Urban Development.

(b) Exception rents.—

(1) Renewal.—In the case of a multifamily housing project described in paragraph (2), pursuant to the request of the owner of the project, the contract for assistance for the project pursuant to subsection (a) shall provide assistance at the lesser of the following rent levels:

(A) Adjusted existing rents.—The existing rents under the expiring contract, as adjusted by an operating cost adjustment factor established by the Secretary (which shall not result in a negative adjustment).

(B) Budget-based rents.—Subject to a determination by the Secretary that a rent level under this subparagraph is appropriate for a project, a rent level that provides income sufficient to support a budget-based rent (including a budget-based rent adjustment if justified by reasonable and expected operating expenses).

(2) Projects covered.—A multifamily housing project described in this paragraph is a multifamily housing project that—

(A) is not an eligible multifamily housing project under section 512(2) [of this note]; or

(B) is exempt from mortgage restructuring under this subtitle pursuant to section 514(h) [of this note].

(3) Moderate rehabilitation projects.—In the case of a project with a contract under the moderate rehabilitation program, other than a moderate rehabilitation contract under section 441 of the McKinney-Vento Homeless Assistance Act [42 U.S.C.A. § 11401], pursuant to the request of the owner of the project, the contract for assistance for the project pursuant to subsection (a) shall provide assistance at the lesser of the following rent levels:

(A) Adjusted existing rents.—The existing rents under the expiring contract, as adjusted by an operating cost adjustment factor established by the Secretary (which shall not result in a negative adjustment).

(B) Fair market rents.—Fair market rents (less any amounts allowed for tenant-purchased utilities).

(C) Market rents.—Comparable market rents for the market area.

(c) Rent adjustments after renewal of contract.—

(1) Required.—After the initial renewal of a contract for assistance under section 8 of the United States Housing Act of 1937 pursuant to subsection (a), (b)(1), or (e)(2) [subsec. (a), (b)(1), or (e) of this section], the Secretary shall annually adjust the rents using an operating cost adjustment factor established by the Secretary (which shall not result in a negative adjustment)

or, upon the request of the owner and subject to approval of the Secretary, on a budget basis. In the case of projects with contracts renewed pursuant to subsection (a) or pursuant to subsection (e)(2) at rent levels equal to comparable market rents for the market area, at the expiration of each 5-year period, the Secretary shall compare existing rents with comparable market rents for the market area and may make any adjustments in the rent necessary to maintain the contract rents at a level not greater than comparable market rents or to increase rents to comparable market rents.

(2) Discretionary.—In addition to review and adjustment required under paragraph (1), in the case of projects with contracts renewed pursuant to subsection (a) or pursuant to subsection (e)(2) at rent levels equal to comparable market rents for the market area, the Secretary may, at the discretion of the Secretary but only once within each 5-year period referred to in paragraph (1), conduct a comparison of rents for a project and adjust the rents accordingly to maintain the contract rents at a level not greater than comparable market rents or to increase rents to comparable market rents.

(d) Enhanced vouchers upon contract expiration.—

(1) In general.—In the case of a contract for project-based assistance under section 8 for a covered project that is not renewed under subsection (a) or (b) of this section (or any other authority), to the extent that amounts for

assistance under this subsection are provided in advance in appropriation Acts, upon the date of the expiration of such contract the Secretary shall make enhanced voucher assistance under section 8(t) of the United States Housing Act of 1937 (42 U.S.C. 1437f(t)) available on behalf of each low-income family who, upon the date of such expiration, is residing in an assisted dwelling unit in the covered project.

(2) Definitions.—For purposes of this subsection, the following definitions shall apply:

(A) Assisted dwelling unit.—The term 'assisted dwelling unit' means a dwelling unit that—

(i) is in a covered project; and

(ii) is covered by rental assistance provided under the contract for project-based assistance for the covered project.

(B) Covered project.—The term 'covered project' means any housing that—

(i) consists of more than four dwelling units;

(ii) is covered in whole or in part by a contract for project-based assistance under—

(I) the new construction or substantial rehabilitation program under section 8(b)(2) of the United States Housing Act of 1937 [subsec.

(b)(2) of this section] (as in effect before October 1, 1983);

(II) the property disposition program under section 8(b) of the United States Housing Act of 1937 [subsec. (b) of this section];

(III) the moderate rehabilitation program under section 8(e)(2) [subsec. (e)(2) of this section] of the United States Housing Act of 1937 (as in effect before October 1, 1991);

(IV) the loan management assistance program under section 8 of the United States Housing Act of 1937 [this section];

(V) section 23 of the United States Housing Act of 1937 [42 U.S.C.A. § 1437u] (as in effect before January 1, 1975);

(VI) the rent supplement program under section 101 of the Housing and Urban Development Act of 1965 [12 U.S.C.A. § 1701s]; or

(VII) section 8 of the United States Housing Act of 1937 [this section], following conversion from assistance under section 101 of the Housing and Urban Development Act of 1965 [12 U.S.C.A. § 1701s],

which contract will (under its own terms) expire during the period consisting of fiscal years 2000 through 2004; and

(iii) is not housing for which residents are eligible for enhanced voucher assistance as provided pursuant to the 'Preserving Existing Housing Investment' account in the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997 (Public Law 104-204; 110 Stat. 2884) [which is not classified to the Code] or any other subsequently enacted provision of law, in lieu of any benefits under section 223 of the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (12 U.S.C. 4113).

(4) Authorization of appropriations.—There are authorized to be appropriated for each of fiscal years 2000, 2001, 2002, 2003, and 2004 such sums as may be necessary for enhanced voucher assistance under this subsection.

(e) Contractual commitments under preservation laws.—Except as provided in subsection (a)(2) and notwithstanding any other provision of this subtitle, the following shall apply:

(1) Preservation projects.—Upon expiration of a contract for assistance under section 8 for a project that is subject to an approved plan of action under the Emergency Low Income Housing Preservation Act of 1987 (12 U.S.C. 1715l note) or the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (12 U.S.C. 4101 et seq.), to the extent amounts are specifically made available in appropriation Acts, the Secretary shall provide to the owner benefits comparable to those

provided under such plan of action, including distributions, rent increase procedures, and duration of low-income affordability restrictions. This paragraph shall apply to projects with contracts expiring before, on, or after the date of the enactment of this section.

(2) Demonstration projects.—

(A) In general.—Upon expiration of a contract for assistance under section 8 for a project entered into pursuant to any authority specified in subparagraph (B) for which the Secretary determines that debt restructuring is inappropriate, the Secretary shall, at the request of the owner of the project and to the extent sufficient amounts are made available in appropriation Acts, provide benefits to the owner comparable to those provided under such contract, including annual distributions, rent increase procedures, and duration of low-income affordability restrictions. This paragraph shall apply to projects with contracts expiring before, on, or after the date of the enactment of this section.

(B) Demonstration programs.—The authority specified in this subparagraph is the authority under—

(i) section 210 of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1996 (Public Law 104-134; 110 Stat. 1321-285; 42 U.S.C. 1437f note);

(ii) section 212 of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997 (Public Law 104-204; 110 Stat. 2897; 42 U.S.C. 1437f note); and

(iii) either of such sections, pursuant to any provision of this title [this note].

(3) Mortgage restructuring and rental assistance sufficiency plans.—Notwithstanding paragraph (1), the owner of the project may request, and the Secretary may consider, mortgage restructuring and rental assistance sufficiency plans to facilitate sales or transfers of properties under this subtitle, subject to an approved plan of action under the Emergency Low Income Housing Preservation Act of 1987 (12 U.S.C. 1715l note) or the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (12 U. S.C. 4101 et seq.), which plans shall result in a sale or transfer of those properties.

(f) Preemption of conflicting State laws limiting distributions.—

(1) In general.—Except as provided in paragraph (2), no State or political subdivision of a State may establish, continue in effect, or enforce any law or regulation that limits or restricts, to an amount that is less than the amount provided for under the regulations of the Secretary establishing allowable project distributions to provide a return on investment, the amount of surplus funds accruing after the date of the enactment of this section that

may be distributed from any multifamily housing project assisted under a contract for rental assistance renewed under any provision of this section (except subsection (b)) to the owner of the project.

(2) Exception and waiver.—Paragraph (1) shall not apply to any law or regulation to the extent such law or regulation applies to—

(A) a State-financed multifamily housing project; or

(B) a multifamily housing project for which the owner has elected to waive the applicability of paragraph (1).

(3) Treatment of low-income use restrictions.—This subsection may not be construed to provide for, allow, or result in the release or termination, for any project, of any low- or moderate-income use restrictions that can not be eliminated by unilateral action of the owner of the project.

(g) Applicability.—Except to the extent otherwise specifically provided in this section, this section shall apply with respect to any multifamily housing project having a contract for project-based assistance under section 8 [this section] that terminates or expires during fiscal year 2000 or thereafter.

Sec. 525. Consistency of Rent Levels Under Enhanced Voucher Assistance and Rent Restructurings

(a) In general.—The Secretary shall examine the standards and procedures for determining and establishing the rent standards described under subsection (b). Pursuant to such examination, the Secretary shall establish procedures and guidelines that are designed to ensure that the amounts determined by the various rent standards for the same dwelling units are reasonably consistent and reflect rents for comparable unassisted units in the same area as such dwelling units.

(b) Rent standards.—The rent standards described in this subsection are as follows:

(1) Enhanced vouchers.—The payment standard for enhanced voucher assistance under section 8(t) of the United States Housing Act of 1937 (42 U. S.C. 1437f(t)).

(2) Mark-to-market.—The rents derived from comparable properties, for purposes of section 514(g) of this Act [section 514(g) of this note].

(3) Contract renewal.—The comparable market rents for the market area, for purposes of section 524(a)(4) of this Act [section 524(a)(4) of this note].

Subtitle D—Office of Multifamily Housing

Sec. 571. Establishment of Office of Multifamily Housing Assistance Restructuring.

There is hereby established an office within the Department of Housing and Urban Development, which shall be known as the Office of Multifamily Housing Assistance Restructuring.

Sec. 572. Director.

(a) Appointment.—The Office shall be under the management of a Director, who shall be appointed by the President from among individuals who are citizens of the United States and have a demonstrated understanding of financing and mortgage restructuring for affordable multifamily housing.

(b) Vacancy.—A vacancy in the position of Director shall be filled by appointment in the manner provided under subsection (a). The President shall make such an appointment not later than 60 days after such position first becomes vacant.

(c) Deputy director.—

(1) In general.—The Office shall have a Deputy Director who shall be appointed by the Director from among individuals who are citizens of the United States and have a demonstrated understanding of financing and mortgage restructuring for affordable multifamily housing.

(2) Functions.—The Deputy Director shall have such functions, powers, and duties as the Director shall prescribe. In the event of the death, resignation, sickness, or absence of the Director, the Deputy Director shall serve as acting Director until the return of the Director or the appointment of a successor pursuant to subsection (b).

Sec. 573. Duty and authority of Director.

(a) Duty.—The Secretary shall, acting through the Director, administer the program of mortgage and rental assistance restructuring for eligible multifamily housing projects under subtitle A [sections 511-524 of Pub.L. 105-65, set out in this note]. During the period before the Director is appointed, the Secretary may carry out such program.

(b) Authority.—The Director is authorized to make such determinations, take such actions, issue such regulations, and perform such functions assigned to the Director under law as the Director determines necessary to carry out such functions, subject to the review and approval of the Secretary. The Director shall semiannually submit a report to the Assistant Secretary of the Department of Housing and Urban Development who is the Federal Housing Commissioner regarding the activities, determinations, and actions of the Director.

(c) Delegation of authority.—The Director may delegate to officers and employees of the Office (but not to contractors, subcontractors, or consultants)

any of the functions, powers, and duties of the Director, as the Director considers appropriate.

(d) Independence in providing information to Congress.—

(1) In general.—Notwithstanding subsection (a) or (b), the Director shall not be required to obtain the prior approval, comment, or review of any officer or agency of the United States before submitting to the Congress, or any committee or subcommittee thereof, any reports, recommendations, testimony, or comments if such submissions include a statement indicating that the views expressed therein are those of the Director and do not necessarily represent the views of the Secretary or the President.

(2) Requirement.—If the Director determines at any time that the Secretary is taking or has taken any action that interferes with the ability of the Director to carry out the duties of the Director under this Act [the Multifamily Assisted Housing Reform and Affordability Act of 1997, Pub.L. 105-65, Title V, Oct. 27, 1997, 111 Stat. 1385, for classification of which see Tables] or that affects the administration of the program under subtitle A of this Act [sections 511-524 of Pub.L. 105-65, set out in this note] in a manner that is inconsistent with the purposes of this Act, including any proposed action by the Director, in the discretion of the Director, that is overruled by the Secretary, the Director shall immediately report directly to the Committee on Financial Services of the House of Representatives and the Committee on Banking,

Housing, and Urban Affairs of the Senate regarding such action. Notwithstanding subsection (a) or (b), any determination or report under this paragraph by the Director shall not be subject to prior review or approval of the Secretary.

Sec. 574. Personnel.

(a) Office personnel.—The Director may appoint and fix the compensation of such officers and employees of the Office as the Director considers necessary to carry out the functions of the Director and the Office. Officers and employees may be paid without regard to the provisions of chapter 51 [section 5105 et seq. of Title 5] and subchapter III of chapter 53 of title 5 [section 5331 et seq. of Title 5], United States Code, relating to classification and General Schedule pay rates.

(b) Comparability of compensation with Federal banking agencies.—In fixing and directing compensation under subsection (a), the Director shall consult with, and maintain comparability with compensation of officers and employees of the Federal Deposit Insurance Corporation.

(c) Personnel of other Federal agencies.—In carrying out the duties of the Office, the Director may use information, services, staff, and facilities of any executive agency, independent agency, or department on a reimbursable basis, with the consent of such agency or department.

(d) Outside experts and consultants.—The Director may procure temporary and intermittent services under section 3109(b) of title 5, United States Code.

Sec. 575. Budget and financial reports.

(a) Financial operating plans and forecasts.—Before the beginning of each fiscal year, the Secretary shall submit a copy of the financial operating plans and forecasts for the Office to the Director of the Office of Management and Budget.

(b) Reports of operations.—As soon as practicable after the end of each fiscal year and each quarter thereof, the Secretary shall submit a copy of the report of the results of the operations of the Office during such period to the Director of the Office of Management and Budget.

(c) Inclusion in President's budget.—The annual plans, forecasts, and reports required under this section shall be included: (1) in the Budget of the United States in the appropriate form; and (2) in the congressional justifications of the Department of Housing and Urban Development for each fiscal year in a form determined by the Secretary.

Sec. 576. Limitation on subsequent employment.

Neither the Director nor any former officer or employee of the Office who, while employed by the Office, was compensated at a rate in excess of the lowest rate for a position classified higher than GS-

15 of the General Schedule under section 5107 of title 5, United States Code, may, during the 1-year period beginning on the date of separation from employment by the Office, accept compensation from any party (other than a Federal agency) having any financial interest in any mortgage restructuring and rental assistance sufficiency plan under subtitle A [sections 511-524 of Pub.L. 105-65, set out in this note] or comparable matter in which the Director or such officer or employee had direct participation or supervision.

Sec. 577. Audits by GAO.

The Comptroller General shall audit the operations of the Office in accordance with generally accepted Government auditing standards. All books, records, accounts, reports, files, and property belonging to, or used by, the Office shall be made available to the Comptroller General. Audits under this section shall be conducted annually for the first 2 fiscal years following the date of the enactment of this Act [Oct. 27, 1997] and as appropriate thereafter.

Sec. 578. Oversight by Federal Housing Commissioner

All authority and responsibilities assigned under this subtitle to the Secretary shall be carried out through the Assistant Secretary of the Department of Housing and Urban Development who is the Federal Housing Commissioner.

Sec. 579. Termination.

(a) Repeals.—

(1) Mark-to-market program.—Subtitle A [§§ 511 to 524 of this note] (except for section 524) is repealed effective October 1, 2011.

(2) OMHAR.—Subtitle D [§§ 571 to 579 of this note] (except for this section) is repealed effective October 1, 2004.

(b) Exception.—Notwithstanding the repeal under subsection (a) [of this note], the provisions of subtitle A [sections 511 to 524 of Pub.L. 105-65, set out in this note] (as in effect immediately before such repeal) shall apply with respect to projects and programs for which binding commitments have been entered into under this Act [the Multifamily Assisted Housing Reform and Affordability Act of 1997, Pub.L. 105-65, Title V, Oct. 27, 1997, 111 Stat. 1385, for classification of which see tables] before October 1, 2011.

(c) Termination of Director and Office.—The Office of Multifamily Housing Assistance Restructuring and the position of Director of such Office shall terminate upon September 30, 2004.

(d) Transfer of authority.—Effective upon the repeal of subtitle D [§§ 571 to 579 of this note] under subsection (a)(2) of this section, all authority and responsibilities to administer the program under subtitle A [§§ 511 to 524 of this note] are transferred to the Secretary.

APPENDIX K — 12 U.S.C. § 1716

§ 1716. Declaration of purposes of subchapter

The Congress declares that the purposes of this subchapter are to establish secondary market facilities for residential mortgages, to provide that the operations thereof shall be financed by private capital to the maximum extent feasible, and to authorize such facilities to—

(1) provide stability in the secondary market for residential mortgages;

(2) respond appropriately to the private capital market;

(3) provide ongoing assistance to the secondary market for residential mortgages (including activities relating to mortgages on housing for low- and moderate-income families involving a reasonable economic return that may be less than the return earned on other activities) by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing;

(4) promote access to mortgage credit throughout the Nation (including central cities, rural areas, and underserved areas) by increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing; and

(5) manage and liquidate federally owned mortgage portfolios in an orderly manner, with a minimum of adverse effect upon the residential mortgage market and minimum loss to the Federal Government.

APPENDIX L — 24 C.F.R. § 200.105

§ 200.105 Mortgagor supervision.

(a) As long as the Commissioner is the insurer or holder of the mortgage, the Commissioner shall regulate the mortgagor by means of a regulatory agreement providing terms, conditions and standards established by the Commissioner, or by such other means as the Commissioner may prescribe.

(b) The Commissioner may delegate to the mortgagee or other party the Commissioner's authority, in whole or in part, in accordance with the terms, conditions and standards established by the Commissioner in any executed Regulatory Agreement or other instrument granting the Commissioner supervision of the mortgagor.

APPENDIX M — 24 C.F.R. § 200.855

§ 200.855 Physical condition standards and physical inspection requirements.

(a) Applicable standards and requirements. The physical condition standards and physical inspection requirements in 24 CFR part 5, subpart G, are applicable to the properties assisted or insured that are listed in § 200.853.

(b) Entity responsible for inspection of property. The regulations that govern the programs listed in § 200.853, or regulatory agreements or contracts, identify the entity responsible for conducting the physical inspection of the property which is HUD, the lender or the owner. For properties with more than one HUD insured loan, only the first mortgage lender is required to conduct the physical inspection. The second mortgage lender will be provided a copy of the physical inspection report by the first mortgage lender.

(c) Timing of inspections.

(1) For a property subject to an annual inspection under this subpart, the inspection shall be conducted no earlier than 9 months and no later than 15 months from the date of the last required inspection. In no event, however, shall the physical inspection be conducted after the end of the calendar year following the one year anniversary date of the last required inspection.

(2) For a property subject to an inspection every two years under this subpart, the inspection shall be conducted no earlier than 21 months and no later than 27 months from the date of the last required inspection. In no event, however, shall the physical inspection be conducted after the end of the calendar year following the two year anniversary date of the last required inspection.

(3) For a property subject to an inspection every three years under this subpart, the inspection shall be conducted no earlier than 33 months and no later than 39 months from the date of the last required inspection. In no event, however, shall the physical inspection be conducted after the end of the calendar year following the three year anniversary date of the last required inspection.

(4) For a newly endorsed multifamily property, the first inspection required under this subpart will be conducted no earlier than 21 months but not later than 27 months from the date of final endorsement. In no event, however, shall the inspection be conducted after the end of the calendar year following the two year anniversary date of final endorsement.

APPENDIX N – 24 C.F.R. § 200.925

§ 200.925 Applicability of minimum property standards.

All housing constructed under HUD mortgage insurance and low-rent public housing programs shall meet or exceed HUD Minimum Property Standards, except that this requirement shall be applicable to manufactured homes eligible for insurance pursuant to § 203.43f of this chapter only to the extent provided therein. The Minimum Property Standards may be waived to the same extent as the other regulatory requirements for eligibility for insurance under the specific mortgage insurance program involved.

APPENDIX O – 24 C.F.R. § 200.925a

§ 200.925a Multifamily and care-type minimum property standards.

(a) Construction standards. Multifamily or care-type properties shall comply with the minimum property standards contained in the handbook identified in § 200.929(b)(2). In addition, each such property shall, for the Department's purposes, comply with:

(1) The applicable State of local building code, if the property is located within a jurisdiction which has a building code accepted by the Secretary under § 200.925a(d); or

(2)(i) The applicable State or local building code, and

(ii) Those portions of the codes identified in § 200.295c which are designated by the HUD Field Office serving the jurisdiction in which the property is to be located, if the property is located in a jurisdiction which has a building code partially accepted by the Secretary; or

(3) The appropriate codes, as identified in § 200.925c(c), if the property is not located within a jurisdiction which has a building code accepted by the Secretary.

(b) Conflicting standards. The minimum property standards contained in the handbook identified in § 200.929(b)(2) do not preempt state or local standards, nor do they alter or affect a builder's

obligation to comply with any state or local requirements. However, a property shall be eligible for benefits only if it complies with all applicable minimum property standards, including referenced standards.

(c) Standard for evaluating local building codes. The Secretary shall compare the portions of a local or State building code applicable to residential or institutional occupancy, as appropriate, submitted under § 200.925a(d) to the list of construction related areas contained in § 200.925b.

(1) A State or local code will be accepted if it regulates each area on the list.

(2) A State or local building code will be partially accepted if it regulates most of the areas on the list. However, no code may be partially accepted if it fails to regulate the subarea for seismic design (see § 200.925b(c)(5)), or if it fails to regulate subareas in more than one of the following major areas listed in § 200.925b: fire safety, light and ventilation, structural loads and seismic design, foundation systems, materials standards, construction components, glass, mechanical, plumbing, electrical, and elevators.

(3) For purposes of this paragraph, a state or local code regulates an area if it establishes a standard concerning that area. However, for earthquake loads (see § 200.925b(c)(5)), ASCE 7-88 is mandatory.

(d) Review process and acceptance—

(1) Jurisdictions without previously accepted building codes. The following submission requirements apply to developers and other interested parties in jurisdictions without building codes, jurisdictions with building codes which have never been submitted for acceptance, and jurisdictions with building codes which have been submitted for acceptance and neither accepted nor partially accepted by the Secretary.

(i) Developers or other interested parties must comply with one of the following by the time of application for insurance or other benefits:

(A) The developer or other interested party may choose to comply with the appropriate codes as identified in § 200.925c. If the developer or other interested party so chooses, then the multifamily or care-type property shall be constructed in accordance with one of the model codes designated in paragraph (c)(1), (2) or (3) of § 200.925c and with any other code or codes identified in the same paragraph. In such instances, the developer or other interested party shall notify the Department of the code or group of codes with which it intends to comply by the time of application for insurance or other benefits; or

(B) The developer or other interested party may choose to comply with the State or local building code, if such code is acceptable to the Secretary. To obtain the Secretary's

acceptance, the developer or other interested party shall submit the material specified in paragraph (d)(1)(ii) of this section to the HUD Field Office serving the jurisdiction in which the property is to be constructed. Such material may be submitted at any time; provided, however, that it must be submitted no later than the time of application for mortgage insurance or other benefits.

(ii) If, under paragraph (d)(1)(i)(B) of this section, the developer or other interested party chooses to comply with the State or local building code as prescribed in paragraph (a)(1) of this section, it shall submit the following material to the HUD field Office serving the jurisdiction in which the property is to be constructed:

(A) A copy of the jurisdiction's building code, including all applicable service codes, appendices and referenced standards; and

(B) A copy of the statute, ordinance, regulation, or order establishing the code, if such statute, ordinance, regulation or order is not contained in the building code itself.

However, the developer or other interested party need not submit any document already on file in the Field Office.

(2) Jurisdictions with previously accepted or partially accepted building codes. The following submission requirements apply to developers and other interested parties in any jurisdiction with a

building code which has been accepted or partially accepted by the Secretary:

(i) At the time of application for mortgage insurance or other benefits, the developer or other interested party shall submit to the HUD Field Office serving the jurisdiction in which the property is to be constructed.

(A) A certificate stating that, since its acceptance by the Secretary, the jurisdiction's building code has not been changed; or

(B)(1) A copy of all changes to the jurisdiction's building code, including all applicable service codes and appendices, which have been made since the date of the code's acceptance by the Secretary. However, the developer or other interested party need not submit any part already in the possession of the Field Office; and

(2) A copy of the statute, ordinance regulation, or order making such changes in the code.

(3) Notification of decision. The Secretary shall review the material submitted under paragraphs (d)(1)(ii) and (2)(i). Following that review, the Secretary shall issue a written notice (except in the case of a previously accepted code which hasn't been changed) to the submitting party stating whether the State or local building code has been accepted, partially accepted, or

whether the Secretary's previous acceptance or partial acceptance has been continued; the basis for the Secretary's decision; and a notification of the submitting party's right to present its views concerning the denial of acceptance if the code is neither accepted nor partially accepted. The Secretary may, in his discretion, permit either an oral or written presentation of views.

(i) If a developer or other interested party is notified that a State or local building code has not been accepted, then the multifamily or care-type properties eligible for HUD benefits in that jurisdiction shall be constructed in accordance with the appropriate codes indicated in § 200.925c(c). In such instances, the developer or other interested party shall notify the HUD Field Office of the code or codes with which it chooses to comply, in accordance with § 200.925a(d)(1)(i)(A).

(ii) If a developer or other interested party is notified that a State or local building code has been partially accepted, then the multifamily or care-type properties eligible for HUD benefits in that jurisdiction shall be constructed in accordance with the applicable State or local building code, plus those additional requirements identified in the written notice issued by the Secretary under § 200.925a(d)(3). The written notice shall identify, in accordance with Appendix J of the Handbook identified in § 200.929(b)(2),

those portions of the codes listed at § 200.925c(a) with which the property must comply.

(iii) Each Regional Office will maintain a current list of jurisdictions with accepted building codes and a current list of jurisdictions with partially accepted building codes. The lists will state the most recent date of each code's acceptance or partial acceptance and will be available to any interested party upon request. In addition, the list of jurisdictions whose codes have been partially accepted shall identify those portions of the codes listed at § 200.925c(a) with which the property must comply.

APPENDIX P – 24 C.F.R. § 207.258a

§ 207.258a Title requirements.

(a) Form of title evidence. The title evidence submitted with a conveyance of the property to the Commissioner shall be in the form of an owner's policy of title insurance, except that, if an abstract and attorney's opinion were accepted by the Commissioner at the time of insurance, the title evidence may be in such form. The title evidence shall be effective on or after the date of the recording of the conveyance to the Commissioner.

(b) Content of title evidence. To be satisfactory to the Commissioner, the title evidence covering the property conveyed to him shall show the same title vested in the Commissioner as was vested in the mortgagor as of the date of the mortgage was filed for record, with the exception of such liens or other matters affecting the title as may be approved by the Commissioner.

APPENDIX Q – 24 C.F.R. § 401.408

§ 401.408 Affordability and use restrictions required.

(a) General. The Restructuring Plan must provide that the project will be subject to affordability and use restrictions in a Use Agreement acceptable to HUD. The Use Agreement must be recorded and in effect for at least 30 years. It must include at least the provisions required by paragraphs (b) through (j) of this section.

(b) Use restriction. The project must continue to be used for residential use with no reduction in the number of residential units without prior HUD approval.

(c) Affordability restrictions. Except during a period when at least 20 percent of the units in a project receive project-based assistance:

(1) At least 20 percent of the units in the project must be leased to families whose adjusted income does not exceed 50 percent of the area median income as determined by HUD, with adjustments for household size, at rents no greater than 30 percent of 50 percent of the area median income; or

(2) At least 40 percent of the units in the project must be leased to families whose adjusted income does not exceed 60 percent of the area median income as determined by HUD, with adjustments

for household size, at rents no greater than 30 percent of 60 percent of the area median income.

(d) Comparable configuration. The type and size of the units that satisfy the affordability restrictions of paragraph (c) of this section must be comparable to the type and size of the units for the project as a whole.

(e) Nondiscrimination against voucher holders. An owner must comply with the nondiscrimination provisions of § 401.556.

(f) Enforcement. The Use Agreement must contain remedies for breach of the Use Agreement, including monetary damages for non-compliance with paragraphs (c) and (g) of this section.

(g) Compliance with physical condition standards. The Use Agreement must require that the property be maintained in compliance with the requirements of § 401.558.

(h) Reporting. The Use Agreement must contain appropriate financial and other reporting requirements for the owner. These reports must comply with the Real Estate Assessment Center protocol or subsequent standards required by HUD.

(i) Enforcement and amendment. The Use Agreement will be enforceable by interested parties to be specified in the Agreement, which will include HUD, the PAE, project tenants, organizations representing project tenants, and the unit of local government. The Use Agreement must require the

party bringing enforcement action to give the owner notice and a reasonable opportunity to cure any violations.

(j) Modifications. HUD will retain the right to approve modifications of the Use Agreement agreed to by the owner without the consent of any other party, including those having the right of enforcement. The owner must post prominently on project property notice of any modifications approved by HUD.

(k) Owner obligation to accept project-based assistance. Subject to the availability of appropriated funds, the owner of the project must accept any offer of renewal of project-based assistance if the offer is in accordance with the terms and conditions specified in the Restructuring Plan.

Nos. 09-435 and 09-445

In the Supreme Court of the United States

NEW WEST, L.P., ET AL., PETITIONERS

v.

CITY OF JOLIET, ILLINOIS, ET AL.

TERESA DAVIS, ET AL., PETITIONERS

v.

CITY OF JOLIET, ILLINOIS

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a city ordinance condemning a privately owned, federally subsidized, low-income housing project is impliedly preempted by federal law that requires the property to be maintained as low-income housing for 30 years.

2. Whether the Property Clause of the Constitution bars a city's exercise of its eminent domain power against property on which the United States holds a mortgage.

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In the Supreme Court of the United States

No. 09-435

NEW WEST, L.P., ET AL., PETITIONERS

v.

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No. 09-445

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 562 F.3d 830.[1] The opinions of the district court (Pet. App. 19a-29a, 30a-42a) are unreported.

[1] All references to "Pet. App." are to the appendix in No. 09-435.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2009. Petitions for rehearing were denied on July 14, 2009 (Pet. App. 43a-44a). The petitions for a writ of certiorari were filed on October 13, 2009 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1997, Congress enacted the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA or Act), Pub. L. No. 105-65, Tit. V, 111 Stat. 1384. The Act's stated purposes are, *inter alia*, "to preserve low-income rental housing affordability and availability while reducing the long-term costs of project-based [federal] assistance"; "to resolve the problems affecting financially and physically troubled federally insured and assisted multifamily housing projects through cooperation with residents, owners, State and local governments, and other interested entities"; and "to protect the interest of project owners and managers, because they are partners of the Federal Government in meeting the affordable housing needs of the Nation." MAHRA § 511(b)(1), (6) and (7), 111 Stat. 1387. To accomplish those purposes, Congress directed the Department of Housing and Urban Development (HUD) to administer a detailed process through which owners of eligible, federally subsidized, low-income housing are entitled to restructure the financing of their properties. In return, MAHRA requires owners to make needed repairs and to agree to maintain the properties as low-income housing for at least 30 years. MAHRA § 514(e), 111 Stat. 1393. HUD has promulgated exten-

sive regulations governing that process. See 24 C.F.R. Pt. 401, 402.

When the owner of eligible low-income housing seeks to refinance its debt, MAHRA requires HUD to develop a Restructuring Plan. MAHRA § 514(a)(1), 111 Stat. 1392; see 24 C.F.R. 401.100, 401.101 (eligibility criteria). HUD hires a Participating Administrative Entity (PAE) to undertake that project. MAHRA § 512(10) and 513, 111 Stat. 1389. Among other things, the PAE assesses whether there is "adequate[,] available and affordable" alternative housing in the particular market, MAHRA § 515(c)(1)(A), 111 Stat. 1397, and analyzes the property's rent level, debt and expenses, as well as its repair and reserve needs. 24 C.F.R. 401.410-411, 401.451-453. Congress created a specific role for local governments and other interested parties in the lengthy restructuring process, mandating notice and an opportunity to participate. MAHRA § 514(f), 111 Stat. 1394; see also 24 C.F.R. 401.500(a), 401.501(b)(1).

The final Restructuring Plan must "require" the owner to rehabilitate the property as necessary and to provide adequate reserves to maintain it in decent and safe condition pursuant to established standards. MAHRA § 514(e)(5), 111 Stat. 1393. The keystone of MAHRA, however, is Section 514(e)(6), which mandates significant use restrictions on the property. That provision specifies that the Restructuring Plan "shall * * * require the owner or purchaser of the project to maintain affordability and use restrictions in accordance with regulations promulgated by [HUD], for a term of not less than 30 years." MAHRA § 514(e)(6), 111 Stat. 1393. In addition, those use restrictions "shall be * * * contained in a legally enforceable document recorded in the appropriate records" and "shall be * * * consistent

with the long-term physical and financial viability and character of the project as affordable housing." MAHRA § 514(e)(6)(A) and (B), 111 Stat. 1393; see 24 C.F.R. 401.408(a). Thus, the statutorily required use restrictions are a form of covenant that runs with the land. Congress has accordingly directed HUD or the PAE to "ensure long-term compliance" with MAHRA and the "binding contractual agreements with owners" executed thereunder. MAHRA § 519(a), 111 Stat. 1404; see 24 C.F.R. 401.550.

2. a. Evergreen Terrace I and II are multifamily properties that have long provided housing to low-income residents of the respondent City of Joliet, Illinois (the City). HUD acquired both properties through foreclosure and sold each to their current owners, petitioners New West, L.P., and New Bluff, L.P. (collectively, New West), for $1 in the early 1980s. HUD insured New West's 40-year mortgages on Evergreen Terrace under Section 221 of the National Housing Act (NHA), 12 U.S.C. 1715*l*. In return, New West became subject to Regulatory Agreements explicitly incorporated into the mortgages, as authorized by the NHA, 12 U.S.C. 1715*l*(d)(4). Those agreements required New West to maintain Evergreen Terrace's 356 units as low-income housing for families eligible for housing assistance under Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f.

b. In November 2001, New West informed HUD of its desire to restructure its Evergreen Terrace debt under MAHRA, thereby triggering the statute's mandatory process. See Pet. App. 6a. HUD selected the Illinois Housing Development Authority (IHDA) to serve as the PAE. IHDA found "a critical need" to preserve Evergreen Terrace. C.A. App. 100. When the City,

which participated in the restructuring process, challenged IHDA's findings, HUD hired another PAE, Heskin Signet Partners, to perform a second analysis. Heskin Signet confirmed IHDA's findings: there is "a compelling need to preserve the housing stock represented by Evergreen Terrace I and II due to the absolute lack of alternative housing for the approximately 600 current residents." *Id.* at 101. Heskin Signet then developed a plan for the cost-effective rehabilitation and ongoing maintenance of the property.

On the basis of the two independent PAE analyses and after meetings with the City, New West, and tenants, HUD approved a final Restructuring Plan for Evergreen Terrace in September 2006. Two months later, New West obtained a mortgage from HUD to replace its prior HUD-insured mortgage, and it executed and recorded the 30-year Use Agreements required by MAHRA Section 514(e)(6). New Regulatory Agreements and contracts for Section 8 housing assistance for the tenants were also executed. C.A. App. 102.

3. In 2005, after the issuance of both PAE reports and as the restructuring process was nearing completion, the City declared Evergreen Terrace to be a "public nuisance," and it enacted an ordinance condemning the property. C.A. App. 312-313, 315-318. Through its exercise of eminent domain, the City proposes to tear down Evergreen Terrace and to redevelop the property for uses other than low-income housing. *Id.* at 316. Soon after passing the ordinance, the City filed this condemnation action in state court, and the case was removed to federal district court. See Pet. App. 4a.

HUD and New West raised preemption and other defenses to the City's action. As HUD explained, Congress created the MAHRA restructured financing pro-

cess in order to preserve the nation's stock of low-income housing in partnership with the private sector. HUD argued that the City's proposed condemnation of Evergreen Terrace and diversion of the property to uses other than low-income housing—without HUD's consent—would pose "an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" in MAHRA. *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1201 (2009) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). HUD therefore contended that, under the Supremacy Clause of the Constitution (Art. VI, Cl. 2) and implied conflict preemption, the City's proposed taking of Evergreen Terrace must yield to the agency's determination in the MAHRA restructuring process that the property can and must be preserved in order to meet the "compelling need" for such housing in the community. C.A. App. 101.

The City moved for judgment on the pleadings with respect to the parties' preemption defense, and the district court granted its motion. Pet. App. 30a-42a. Relying on a discussion of different statutes in a related case in which HUD was not a party, see *New West, L.P.* v. *City of Joliet*, 491 F.3d 717, 721 (7th Cir. 2007), the district court held that MAHRA does not preempt the City's proposed exercise of its eminent domain power. Pet. App. 40a-41a. In a later order, the district court denied motions for summary judgment filed by HUD and New West, which argued, among other things, that the City's action was barred by the Property Clause of the Constitution (Art. IV, § 3, Cl. 2). Pet. App. 19a-29a.[2]

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[2] Several Evergreen Terrace tenants—petitioners in No. 09-445—intervened as defendants in the City's action in January 2008. Pet. App. 28a-29a.

HUD and New West petitioned the district court to certify for interlocutory review pursuant to 28 U.S.C. 1292(b) its order rejecting their implied preemption defense. New West also asked the district court to certify its order rejecting certain other defenses that it had raised in its summary judgment motion. The court granted HUD's and New West's requests, and the court of appeals accepted review.

4. The court of appeals affirmed. It found no "clear statement" or "federal command" in the housing laws at issue that preempted the City's ordinance authorizing the condemnation of Evergreen Terrace, explaining that the "findings" and "purposes" provisions of those statutes were insufficient to establish Congress's intent to preempt. Pet. App. 12a-14a. Relying on *Wyeth*, 129 S. Ct. at 1199-1204, the court of appeals further found it significant that there was no "preemptive regulation with the force of law." Pet. App. 8a; see also *id.* at 11a, 12a. The court concluded that there was no clash of goals and objectives because several HUD regulations demonstrated the agency's intent not to preempt the condemnation of federally subsidized housing for low-income families. *Id.* at 8a-10a. The court also found it "hard to see any conflict between federal and state goals" because participation in the involved low-income housing program is not "compulsory," and "it is not a violation of federal law for a given owner to remain outside the program." *Id.* at 9a.

Thus, according to the court of appeals, "there is no *affirmative* declaration of preemption in any statute or rule, no concrete conflict between condemnation and any part of [MAHRA], and no good reason to think that [MAHRA] contravenes HUD's own regulations under § 8 and [NHA] § 221." Pet. App. 11a. The court added:

> It might be sensible to enact a system under which HUD could certify a lack of affordable housing in a given locale and thus block any steps to diminish the existing stock. But no federal statute gives HUD this authority, let alone one that can be exercised without notice to the cities whose powers will be diminished.

Id. at 15a.

The court of appeals also rejected several additional arguments advanced by New West and the tenants based on the Contract and Property Clauses of the Constitution (Art. I, § 10, Cl. 1; Art. IV. § 3, Cl. 2) and the principle of intergovernmental immunity. Pet. App. 17a-18a. The court found no authority holding that "the Property Clause (or any other part of the Constitution) treats a federal loan as immunizing the borrower from state regulation (including eminent domain) on the theory that the state is 'really' regulating the federal interest as a lender." *Id.* at 18a. HUD, New West, and the tenants sought rehearing en banc, and the court denied the petitions. *Id.* at 43a-44a.

ARGUMENT

The court of appeals erred in ruling that MAHRA does not preempt the City's condemnation of Evergreen Terrace. HUD determined, in the extensive MAHRA process in which the City participated, that Evergreen Terrace could be rehabilitated and must be preserved in order to meet the "compelling need" for low-income housing in the Joliet community. C.A. App. 101. HUD accordingly provided New West with restructured financing for the property, and, in return, New West agreed in a recorded, "legally enforceable" document—as MAHRA Section 514(e)(6) explicitly requires—to

maintain the property as low-income housing for at least 30 years. The City now seeks to override that process and to veto HUD's determination by condemning Evergreen Terrace and diverting the property to other uses. That effort is contrary to the cooperative, participatory role that Congress prescribed for local governments in the MAHRA restructuring process and presents "an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" in MAHRA. *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1201 (2009) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). The City's condemnation ordinance and action are therefore preempted.

Nonetheless, review by this Court is not warranted at the present time. This case is the first in which a State or local government has sought to condemn, without HUD's consent, a property that has undergone MAHRA restructuring. The Court's ultimate resolution of the preemption question presented by both petitions would benefit from further consideration in the lower courts. Similarly, the Property Clause question presented by New West's petition for a writ of certiorari has not previously been addressed by any other court of appeals. Further review therefore is not warranted.

A. 1. a. The court of appeals erred in relying on the absence of "a preemptive regulation with the force of law" in concluding that preemption could not be "inferred from a clash of goals and objectives" in the context of this case. Pet. App. 8a.; see *id.* at 11a, 12a. The court based that conclusion on this Court's recent decision in *Wyeth*, 129 S. Ct. at 1199-1204. But neither *Wyeth* nor any other decision of this Court holds that a preemptive regulation is necessary in order to find "frustration of purpose" preemption. In fact, this Court

rejected that argument in *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000):

> To insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended. The dissent * * * apparently welcomes that result, at least where "frustration-of-purpos[e]" pre-emption by agency regulation is at issue. * * * We do not.

Id. at 885.

Wyeth is not to the contrary. There, the Court found no preemption because, it concluded, state failure-to-warn claims did not present an obstacle to the accomplishment of the purposes of federal drug labeling requirements. 129 S. Ct. at 1204. The Court declined to give deference to the position of the Food and Drug Administration (FDA) that there was preemption, because that position was expressed only in a preamble to a rule, was contrary to "Congress' purposes" in the federal drug laws, and was a reversal of FDA's "own longstanding position without * * * a reasoned explanation" or "any discussion of how state law has interfered" with federal regulation. *Id.* at 1201. Citing *Geier*, *supra*, the Court explained that "an agency regulation with the force of law can pre-empt conflicting state requirements." *Wyeth*, 129 S. Ct. at 1200. But the Court noted that, even when such a regulation exists, the Court has "performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption." *Id.* at 1200-1201.

Thus, while *Wyeth* reaffirmed that a properly promulgated agency regulation can preempt state law, 129

S. Ct. at 1200, *Wyeth* does not support the weight the court of appeals attached to the absence of such a regulation here.

b. The court of appeals also misunderstood the nature of the lengthy MAHRA restructuring process prescribed by Congress. The court acknowledged that "[i]t might be sensible to enact a system under which HUD could certify a lack of affordable housing in a given locale and thus block any steps to diminish the existing stock." Pet. App. 15a. The court mistakenly concluded, however, that "no federal statute gives HUD this authority, let alone one that can be exercised without notice to the cities whose powers will be diminished." *Ibid.* In fact, the "sensible" process the court of appeals posited is precisely what the MAHRA entails and what occurred in this case.[3]

As explained above, before HUD can approve a Restructuring Plan, MAHRA requires an assessment of the "adequate[,] available and affordable housing" in the particular market. MAHRA § 515(c)(1)(A), 111 Stat 1397. In addition, the owner and PAE must evaluate the project's "rehabilitation needs," and the owner is "require[d] * * * to take such actions as may be necessary to rehabilitate [the property], [to] maintain adequate reserves, and to maintain the project in decent and safe condition." MAHRA § 514(e)(3) and (5), 111 Stat. 1393. Local governments are given notice and the opportunity to participate in the restructuring process. MAHRA § 514(f)(1) and (2), 111 Stat. 1394.

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[3] The court of appeals mistakenly believed that HUD's preemption argument rested solely on the NHA and MAHRA "findings" and "purposes" clauses, overlooking, in particular, the operative provisions of MAHRA cited and discussed by HUD. See Pet. App. 8a, 12a-14a.

Pursuant to those statutory requirements, HUD obtained two independent evaluations of the need for Evergreen Terrace, as well as the feasibility and cost of rehabilitating the property. Both reports concluded that there was a "compelling need" to preserve Evergreen Terrace because of "the absolute lack of alternative housing" in the Joliet area for Evergreen Terraces's 600 low-income residents. C.A. App. 101. The reports also concluded that Evergreen Terrace could be "repaired in a cost-effective manner." *Ibid.* Based on those analyses and other information obtained during the restructuring process, HUD approved the Restructuring Plan and provided new mortgages to New West, and New West executed the 30-year Use Agreements mandated by MAHRA Section 514(e)(6). And contrary to the court of appeals' suggestion that the MAHRA process is conducted "without notice to the cities whose powers will be diminished," Pet. App. 15a, the City not only received the notice required by MAHRA Section 514(f) but also participated actively in the restructuring process. See *New West, L.P.* v. *City of Joliet*, No. 05-C-1743, 2006 WL 2632752, at *1-*2 (N.D. Ill. Sept. 8, 2006), rev'd, 491 F.3d 717 (7th Cir. 2007).

Thus, MAHRA prescribes an administrative process that essentially constitutes the "sensible" system the court of appeals acknowledged would preempt the City's condemnation action. Pet. App. 15a. That process, which is established by the statute itself, makes unnecessary a HUD regulation specifically stating MAHRA's preemptive effect.[4]

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[4] The decision below also appeared to rest on two incorrect factual assumptions. First, the court cited various HUD regulations that refer to the condemnation of low-income housing properties, see Pet. App. 10a (citing 24 C.F.R. 245.405, 248.101 and 970.3), and questioned "the

c. The court of appeals erred in reasoning that MAHRA lacks preemptive effect because it permits, but does not mandate, property owners to restructure their financing under its terms. See Pet. App. 9a. That proposition is inconsistent with *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982), which held that a Federal Home Loan Bank Board (the Board) regulation that permitted, but did not require, federal savings and loan associations to include "due-on-sale" clauses in their mortgage contracts preempted state law that restricted the use of such clauses. This Court reasoned that such state law posed an obstacle to an objective that the Board considered essential and, in addressing an argument similar to the view of the court of appeals, stated that "[t]he conflict [between federal and state law] does not evaporate because the Board's regulation simply permits, but does not compel, federal sav-

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point of a special rule for applying the proceeds of condemnation if, as HUD argues, condemnation is always preempted." *Ibid.* But apart from the fact that the cited regulations implement different housing programs not at issue here, HUD has never contended that a city's condemnation of any federally subsidized low-income housing project is always preempted by federal law. The key factor is HUD's determination of the viability of and need for the project in accordance with statutory mandates for the particular federal housing program involved.

Second, the court stated that "[p]rivate owners are entitled to withdraw their properties from the program at any time despite their 20-year and 30-year promises" by paying off their federally insured loans. Pet. App. 9a (citing 24 C.F.R. Pt. 248). That is incorrect. The regulatory provisions the court cited as support for that assertion were promulgated under a different statute. See Emergency Low Income Housing Preservation Act of 1987, 12 U.S.C. 1715*l* note; Low-Income Housing Preservation and Resident Homeownership Act of 1990, 12 U.S.C. 4101 *et seq.* Prepayment of a loan on a property that has undergone MAHRA restructuring does not extinguish the statutorily mandated and recorded 30-year use restriction.

ings and loans to include due-on-sale clauses in their contracts." *Id.* at 155-156.

While the decision to participate in a federally subsidized low-income housing program is voluntary, once a private owner decides to participate, federal law imposes requirements on that owner and regulates its participation in the program. Thus, the focus must be on what Congress intended when it created the program and imposed those requirements, not on whether participation in the program is voluntary or mandatory. See *Wyeth*, 129 S. Ct. at 1194 ("the purpose of Congress is the ultimate touchstone in every pre-emption case") (citation omitted).

2. Despite the errors in the decision below, this Court's review is not warranted. This is the first case in which a state or local government has sought to condemn and divert to a different use a federally subsidized housing property that has undergone restructuring under MAHRA and that is therefore subject to the statute's 30-year use restriction.

a. In their petition for a writ of certiorari, the Evergreen Terrace tenants contend that the circuits are divided on whether a federal preemptive regulation with the force of law is necessary to a finding of implied preemption. 09-445 Pet. 17-24. The court of appeals in this case does not appear to have held that such a regulation is always necessary. See Pet. App. 9a, 10a-11a. By the same token, that issue was not squarely presented in the courts of appeals cases upon which the tenants rely. In *City of Morgan City* v. *South Louisiana Electric Cooperative Ass'n*, 31 F.3d 319, 324 (5th Cir. 1994), cert. denied, 516 U.S. 908 (1995) (*Morgan City*), and *Public Utility District No. 1 of Pend Oreille County* v. *United States*, 417 F.2d 200, 201 (9th Cir. 1969) (*Pend Oreille*),

the courts of appeals held that a local jurisdiction's attempt to condemn certain property of a utility financed by the federal government under the Rural Electrification Act of 1936 (REAct), 7 U.S.C. 901 *et seq.*, was preempted because it would frustrate the accomplishment of Congress's goals and objectives under that act.[5]

As in this case, the federal government's preemption argument in *Morgan City* and *Pend Oreille* was based on the effect of the governing statutory scheme and did not rely on a preemptive regulation. Thus, the holdings in *Morgan City* and *Pend Oreille* implicitly suggest that a preemptive regulation with the force of law is not necessary for a finding of implied preemption. But the need for a regulation *vel non* does not appear to have been raised in either case, and neither court addressed the issue. And in any event, this Court's decision in *Geier*, 529 U.S. at 885, makes clear that a federal regulation can preempt state law but is not required in all instances of implied preemption.

Morgan City and *Pend Oreille* also demonstrate that a sovereign's historic power of eminent domain is not absolute or immune to implied preemption by federal law.[6] In a general sense, those decisions are thus in ten-

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[5] Cf. *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 388-389 (1983) (if the federal government changes policy and announces that state rate regulation of rural power cooperatives is inconsistent with federal policy, "it would of course pre-empt" state action); *City of Stilwell* v. *Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1045 (10th Cir. 1996) (REAct did not preempt condemnation, where facts and particular statutory provisions differed from those at issue in *Morgan City* and *Pend Oreille*, and federal government did not oppose condemnation).

[6] Similarly, *Hayfield N. R.R.* v. *Chicago & N. W. Transp. Co.*, 467 U.S. 622 (1984), confirms that a State's invocation of the power of eminent domain does not preclude a finding of preemption. While holding

sion with the result and reasoning of the decision below. See Pet. App. 16a-17a. But because the preemption inquiry is necessarily statute-specific, there is also no direct conflict between *Morgan City* and *Pend Oreille* and the decision in this case.

b. The Evergreen Terrace tenants further contend that the circuits are divided on whether the voluntary nature of participation in a federal program is relevant to the preemption inquiry. 09-445 Pet. 25-26 (citing *Morgan City*, 31 F.3d at 324; *Pend Oreille*, 417 F.2d at 202-203; and *Forest Park II* v. *Hadley*, 336 F.3d 724 (8th Cir. 2003) (*Forest Park*)). There is no direct conflict among the circuits on that issue.

It is true that, although participation in the federal rural electrification program is not compulsory, the courts in *Morgan City* and *Pend Oreille* held that federal law preempted the proposed condemnation of cooperative utility property financed under the REAct. And in *Forest Park II*, 336 F.3d at 731-734, the court held that a state law that effectively prevented the owner of federally subsidized housing from voluntarily withdrawing from the particular housing program was preempted because it interfered with the framework established by Congress. Thus, the voluntary nature of the federal programs at issue in all three cases did not preclude a finding of preemption. Nonetheless, because those decisions did not address that factor, they do not squarely conflict with the position articulated in the decision below.

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that there was no preemption of the use of state eminent domain authority to condemn a segment of railroad track that had been abandoned pursuant to federal law, *id.* at 637, the Court reached that conclusion only after thorough consideration of implied preemption arguments.

c. New West argues that review of the court of appeals preemption ruling is warranted because the court failed to address the fact that "Congress *expressly* delegated to HUD the power to decide whether and how Evergreen Terrace should be preserved as affordable housing for the next 30 years." 09-435 Pet. 20. According to New West, HUD's determination in that regard is entitled to deference because the agency was "acting within the scope of its congressionally delegated authority." *Id.* at 21 (quoting *New York* v. *FERC*, 535 U.S. 1, 18 (2002)).

New West's argument, however, is misplaced. As the Court explained in *New York*, 535 U.S. at 17, whether Congress has delegated to a federal agency the authority to displace state action is a "quite different legal question[]" from whether state law conflicts with federal law. This case involves only the latter question. Delegation can arise as an issue when an agency has promulgated a regulation or rendered a decision expressing an intent to preempt state law and that determination is challenged as beyond the scope of the agency's statutory authority. See, *e.g.*, *City of New York* v. *FCC*, 486 U.S. 57 (1988). There is no such regulation or order in this case.

B. The portion of the decision below rejecting New West's argument that the Property Clause prevents the City from exercising its eminent domain power over Evergreen Terrace also does not warrant review. See 09-435 Pet. 25-28. The court recognized that HUD has an interest as "a secured creditor" of New West, but it found no basis for concluding that the Property Clause "treats a federal loan as immunizing the borrower from state regulation (including eminent domain) on the the-

ory that the state is 'really' regulating the federal interest as a lender." Pet. App. 18a.

The federal government's property interest in Evergreen Terrace is more significant than the court of appeals' discussion suggests. The Property Clause of the Constitution (Art. IV, § 3, Cl. 2) gives Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." This Court has interpreted Congress's power concerning "other Property" expansively to include the "regulation of all other personal and real property rightfully belonging to the United States." *Ashwander* v. *TVA*, 297 U.S. 288, 331 (1936) (citation omitted). See generally *Kleppe* v. *New Mexico*, 426 U.S. 529, 538-541 (1976) (Property Clause power reaches beyond territorial limits). The interests of the United States, first as mortgage-insurer and then as mortgage-holder for Evergreen Terrace, are therefore property interests within the meaning of the Property Clause.

In *California Coastal Commission* v. *Granite Rock Co.*, 480 U.S. 572 (1987), however, this Court explained that "'the State is free to enforce its criminal and civil laws' on federal land so long as those laws do not conflict with federal law. The Property Clause itself does not automatically conflict with all state regulation of federal land." *Id.* at 580 (citing *Kleppe*, 426 U.S. at 543). The Court therefore concluded that, despite Congress's "plenary power" over federal property, "even within the sphere of the Property Clause, state law is pre-empted only when it conflicts with the operation or objectives of federal law, or when Congress 'evidences an intent to occupy a given field.'" *Id.* at 593 (citation omitted). Thus, a Property Clause issue ultimately requires con-

sideration of the same factors that apply to preemption under the relevant federal statutes. The Property Clause does not provide an independent defense to the City's proposed condemnation of Evergreen Terrace.

In any event, no other court of appeals has had occasion to address the effect of the Property Clause on the proposed condemnation of federally subsidized low-income housing. Further review of that issue is accordingly not warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2010